No. _____

In the Supreme Court of the United States

CITY OF MANSFIELD, OHIO, LAWRENCE HARPER, PHILIP MESSER, RONALD KREUTER, DALE FORTNEY, AND ROBERT KONSTAM,

Petitioners,

v.

JEFFREY MCKINLEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

RICHARD P. GODDARD
Counsel of Record
JEFFREY J. LAUDERDALE
CALFEE, HALTER & GRISWOLD LLP
1400 MCDONALD INVESTMENT CENTER
800 SUPERIOR AVENUE
CLEVELAND, OH 44114-2688
(216) 622-8200

Attorneys for Petitioners

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

I. Whether a municipal employer and its officials may be held liable for damages under 42 U.S.C. § 1983 when they conduct a lawful *Garrity* interview and question a city police officer about job-related misconduct under threat of termination if an independent prosecutor later introduces the officer's statements against him at a criminal trial in violation of the Fifth Amendment.

II. Whether a municipality and city officials who conduct a constitutionally sound *Garrity* interview can be held liable for damages under 42 U.S.C. § 1983 for providing the interviewee's statements to an independent prosecutor.

III. Whether a municipal official can be held personally liable for damages under 42 U.S.C. § 1983 for testifying as a witness in a criminal trial, pursuant to a prosecutor's direction, about the substance of a municipal employee's statements obtained pursuant to a *Garrity* interview.

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioners are City of Mansfield, Ohio, Lawrence Harper, Philip Messer, Ronald Kreuter, Dale Fortney, and Robert Konstam.

Respondent is Jeffrey McKinley.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

No public or private corporation is a party to these proceedings.

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PETITION FOR WRIT OF CERTIORARI

Petitioners City of Mansfield, Ohio, Lawrence Harper, Philip Messer, Ronald Kreuter, Dale Fortney, and Robert Konstam respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, decided April 11, 2005, reversing in part the decision of the United States District Court for the Northern District of Ohio, Eastern Division, is published at 404 F.3d 418 (6th Cir. 2005)(App. at 3a - 55a). The Sixth Circuit's unpublished order denying Petitioners' Petition for Panel Rehearing or Rehearing *En Banc* was filed on July 19, 2005. (App. at 1a - 2a).

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, granting summary judgment in favor of Petitioners, was filed on August 27, 2003 and is unreported. (App. at 56a - 86a, 87a).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 11, 2005 (App. at 3a). A timely Petition for Panel Re-hearing or Re-hearing *En Banc* was denied on July 19, 2005 (App. at 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

United States Constitution, Amendment V:

> No person shall be . . . compelled in any criminal case to be a witness against himself . . . .

28 U.S.C. Section 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1343(a)(4):

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> ...
>
> (3) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Civil Rights Act - 42 U.S.C. Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF THE CASE

A. Introduction

This case raises the specific question whether a municipal employer and its officials can be held liable for damages under 42 U.S.C. § 1983 when they compel a city police officer to answer job-related questions concerning the officer's alleged misconduct if an independent prosecutor, in violation of the officer's Fifth Amendment rights, subsequently and unilaterally introduces the officer's statements against him at a criminal trial.

At the heart of this case lies this Court's seminal decision in *Garrity v. New Jersey*, 385 U.S. 493 (1967). In *Garrity* and its progeny, this Court has held that the Constitution permits a public employer to require its employees to answer questions about their job-related conduct under threat of discipline, as long as the employer does not ask or require that the employee waive his Fifth Amendment right against self-incrimination. The employer, however, may impose discipline upon the employee, including termination, if the employee either admits to wrongdoing or refuses to answer the employer's questions truthfully.

Accordingly, this Court in *Garrity* balanced two competing interests, both of which carry great import to the public at large. First, it reinforced a municipality's right to compel public servants to account for their public trust; second, this Court held that the Constitution demands that the *Garrity* statements be accorded use immunity, making them inadmissible in a subsequent criminal trial of the employee, thus protecting the employee's Fifth Amendment rights. *See Lefkowitz v. Turley*, 414 U.S. 70, 81 (1973) (describing balance of interests struck by *Garrity* and its progeny).

As contemplated by this Court, the appropriate remedy for the improper use of an employee's *Garrity* statement in a criminal proceeding would be the reversal of any conviction and the exclusion of the statements from evidence. On the facts of this case, however, the Sixth Circuit announced a new remedy. In a two-to-one decision, the Sixth Circuit held that a federal court may entertain a § 1983 action by the employee for monetary damages against the municipality and all of the city officials involved in the *Garrity* investigation. It held that such an action may be brought, not against the independent prosecutor who used the statements in violation of the Fifth Amendment, but against the municipal employer and its officials who lawfully conducted the *Garrity* interview in the first instance and the police officer who testified concerning the interview. The Sixth Circuit approved such an action even though the decision to use the employee's statements in a subsequent prosecution was solely that of an independent prosecutor over whom the municipality and its officials had absolutely no control.

The Sixth Circuit's decision in this matter directly conflicts with this Court's jurisprudence in this substantive area over the past four decades and destroys the balance that this Court created in *Garrity*. Furthermore, the probable effect of the Sixth Circuit's decision - which permits the imposition of civil liability on a municipality and its officials who have done nothing more than conduct a lawful *Garrity* interview, provide the results of their investigation to an independent prosecutor, and testify at the prosecutor's direction - will be the complete curtailment of *Garrity* interviews, and municipalities will lose an essential tool for holding their public officers accountable for their job-related misconduct. Because a municipality has no control over the actions of independent prosecutors who exercise complete discretion over whether and how to use an employee's *Garrity*

statements at trial, the only way a municipality may avoid civil liability is to abandon *Garrity* interviews altogether. By its decision, the Sixth Circuit has undermined the use of the *Garrity* interview as a means to compel public employees to account for the public trust placed in them.

B. Statement of Facts

In 2000, officials in Mansfield, Ohio ("the City") received reports that City police officers had been misusing police scanners to eavesdrop on private cell phone calls. Petitioner Lieutenant Detective Dale Fortney was placed in command of an investigation of these reports. Sixth Circuit Opinion, 404 F.3d 418, 423 (6th Cir. 2005) (App. at 5a - 6a). Fortney interviewed certain police officers, including Respondent Jeffrey McKinley ("McKinley"), and conducted two interviews of McKinley in full compliance with this Court's decision in *Garrity*. The *Garrity* interviews took place on February 25, 2000 (the "first interview") and March 7, 2000 (the "second interview"). 404 F.3d at 423 (App. at 6a).

During both interviews, McKinley was informed, consistent with *Garrity*, that he could be disciplined if he refused to answer Fortney's questions truthfully. McKinley also was informed that no statements given by him could be used against him in any criminal prosecution based on the matters under investigation. At no time was McKinley asked or required to waive his Fifth Amendment right against self-incrimination. 404 F.3d at 423-25 (App. at 5a - 8a). During the first interview, McKinley steadfastly claimed to have no knowledge of the alleged scanner misuse. Due to inconsistencies between statements made by McKinley during the first interview and statements received from others, Fortney opted to re-interview McKinley. In the second interview, McKinley admitted he had lied during the first

interview and acknowledged that he was aware of, and involved in, the alleged scanner misuse. 404 F.3d at 425 (App. at 9a - 10a).

As a result of its investigation, the City took immediate disciplinary action against several officers, including McKinley, pursuant to its authority under *Garrity* to administratively discipline any public employee who admits to wrongdoing during the course of a *Garrity* interview. 404 F.3d at 425 (App. at 10a). Ultimately, McKinley received a 120-day suspension. (App. at 68a).

The City concluded its investigation and enlisted Stephen Knowling, the Assistant Prosecuting Attorney for neighboring Holmes County, Ohio, as an independent Special Prosecutor to determine whether any laws had been violated and whether charges could or should be brought against any of the City police officers involved with the alleged misuse of police scanners. 404 F.3d at 425-26 (App. at 10a). To aid Knowling in determining whether charges were appropriate, the City produced to him all information in its possession that pertained to the scanner misuse and its investigation - including the *Garrity* statements of McKinley and other officers. 404 F.3d at 425-26 (App. at 10a).

After completing his review, Knowling unilaterally charged McKinley with three criminal counts under Ohio law. 404 F.3d at 425 (App. at 10a - 11a). On July 26, 2001, after a one-day trial in which McKinley's *Garrity* statements were introduced as evidence by Knowling through Fortney, a jury convicted McKinley on two counts - one count of falsification and one count of obstructing official business - for lying during the first interview. 404 F.3d at 425 (App. at 10a - 11a). On June 25, 2002, the Ohio Court of Appeals for Richland County vacated McKinley's conviction on grounds

that are not relevant to this Petition. *See State v. McKinley*, No. 01CA98, 2002 Ohio App. LEXIS 3866 (Ohio Ct. App. June 25, 2002) (holding that use of McKinley's *Garrity* statements violated an immunity agreement between McKinley and the City).

On November 27, 2002, McKinley instituted this action in the United States District Court for the Northern District of Ohio, asserting, *inter alia*, claims under 42 U.S.C. § 1983. The Complaint named as defendants the City and certain of its officials, including Fortney, all Petitioners before this Court. 404 F.3d at 426 (App. at 12a, 57a).

The District Court granted summary judgment in Petitioners' favor on all of McKinley's federal claims, and McKinley appealed to the United States Court of Appeals for the Sixth Circuit. The appeal was confined to the two constitutional claims McKinley brought under § 1983: (1) that Petitioners maliciously prosecuted him in violation of the Fourth Amendment; and (2) that Petitioners violated his Fifth Amendment "rights to be free from self incrimination" by compelling him in the second interview to make incriminating statements as to falsification and obstruction, which statements were later used by Special Prosecutor Knowling against McKinley at his trial for those crimes. 404 F.3d at 426 (App. at 12a).

A three-judge panel for the Sixth Circuit affirmed summary judgment against McKinley on his § 1983 claim based on malicious prosecution but reversed summary judgment on his § 1983 claim based on the Fifth Amendment. 404 F.3d at 445-46 (App. at 52a). In a two-to-one decision, the Sixth Circuit held that there was a genuine issue of material fact as to whether Petitioners had violated McKinley's Fifth Amendment rights. *Id.* The Sixth Circuit

held that, even though this Court in *Garrity* and its progeny had declared that the Constitution permits a public employer to compel a subordinate to answer job-related questions truthfully under threat of discipline, the public employer and its officials may be liable in damages to the employee under § 1983 if an independent prosecutor should later enter the substance of that interview into evidence against the employee at a criminal trial:

> Next we must consider the district court's conclusion that McKinley's § 1983 action cannot lie against Defendants, who are police officers, because "the only representative of the State who 'used' [McKinley's] statements against him in court was the Special Prosecutor." We reject this interpretation of the Fifth Amendment for several reasons.

404 F.3d at 436-37 (App. at 34a) (alterations in original). The Sixth Circuit held that, in this instance, because Special Prosecutor Knowling compelled Fortney to testify at McKinley's trial, and because Fortney testified about the substance of McKinley's *Garrity* interviews, Petitioners could be liable to McKinley under § 1983 for violation of McKinley's Fifth Amendment right to be free from self-incrimination:

> Our conclusion that Fortney may be held liable does not mean that causation will be easy to prove in every case. A police officer may defend on the grounds that he attempted to prevent the use of the allegedly incriminating statements at trial, or that he never turned the statements over to the prosecutor in the first place. Such a defense would be of no avail to Fortney, who turned McKinley's statements over to the prosecutor, took the stand at McKinley's trial, and

> testified about McKinley's having made the statements.

404 F.3d at 439 (App. at 39a).

Petitioners filed a Motion for Panel Re-hearing or Re-hearing *En Banc* before the Sixth Circuit, (App. at 1a), citing the conflict between the Sixth Circuit's decision and the decisions of this Court in *Garrity* and its progeny. The Sixth Circuit denied Petitioners' Petition for Panel Re-hearing or Re-hearing *En Banc*, without explanation, on July 19, 2005.

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit for two principal reasons. First, the decision of the Sixth Circuit directly contradicts established Supreme Court precedent and, if followed, would abrogate several of this Court's decisions. Second, the issues presented herein are of national importance because they impact the ability of municipal employers to hold their employees accountable for their official conduct, thus undermining public confidence in and the effective functioning of government.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT WHICH ESTABLISH A MUNICIPALITY'S RIGHT TO INVESTIGATE MISCONDUCT OF ITS PUBLIC OFFICIALS WITHOUT RISK OF CIVIL LIABILITY.

The practical impact of the Sixth Circuit's decision in this matter will be to eliminate the *Garrity* interview as an effective vehicle for the investigation of misconduct of public officials, in direct contravention of this Court's decisions in

Garrity and its progeny. This Court has held: (1) the taking of a *Garrity* interview by municipal officials is constitutional, *Garrity*, 385 U.S. at 497; *Gardner v. Broderick*, 392 U.S. 273, 278 (1968); *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977); (2) the production of a *Garrity* statement by a municipality to a prosecutor does not violate the Constitution, *Kastigar v. United States*, 406 U.S. 441 (1972); (3) the testimony of a municipal official in a criminal action cannot serve as the basis for § 1983 liability, *Briscoe v. LaHue*, 460 U.S. 325, 341-45 (1983); and (4) a cause of action under § 1983 cannot be based on a defendant's pretrial actions unless the defendant's actions constitute a due process violation that "shocks the conscience." *Chavez v. Martinez*, 538 U.S. 760, 772-73 (2003). Because the Sixth Circuit's decision in this case directly conflicts with each of these four well-established tenets of Supreme Court jurisprudence, this Court should issue a Writ of Certiorari and require the Sixth Circuit to follow this Court's precedent.

A. Contrary to the Sixth Circuit's decision, this Court has held that the Constitution allows a municipal employer, without risk of civil liability, to require its employees to answer job-related questions concerning official misconduct and to discharge them if they refuse to answer.

In *Garrity*, "th[is] Court provided for effectuation of the important public interest in securing from public employees an accounting of their public trust. Public employees may *constitutionally* be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity." *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) (emphasis added). *See also Lerner v. Casey*, 357 U.S. 468, 477-78 (1951) ("[A] government

employee can be required upon pain of dismissal to respond to inquiry probing into matters relevant to his employment."). Accordingly, this Court in *Cunningham* held that a municipality may constitutionally subject its employees to the rigors of a *Garrity* interview to force them to account for their actions while on the public payroll. The mere taking of a *Garrity* interview does not violate the Fifth Amendment. "Rather, the Constitution is violated only when the compelled statement, or the fruit of that statement, is used against the officer in a subsequent criminal proceeding." *In re Grand Jury Subpoenas*, 40 F.3d 1096, 1102 (10th Cir. 1994) (citing *Garrity*, 385 U.S. at 500). The Fifth Amendment merely "prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." *Garrity*, 385 U.S. at 500.

This Court has made clear that the taking of a *Garrity* interview violates the Constitution only if the employer conducting the interview has violated one of two restrictions: (1) the questions asked of the employee must be "specifically, directly, and narrowly relating to the performance of his official duties," *Gardner v. Broderick*, 392 U.S. 273, 278 (1968); and (2) the employee must not be asked or required to waive his Fifth Amendment right against self-incrimination. *Id.* at 279. Here, the Sixth Circuit did not find, and McKinley has never suggested, that the City conducted anything but a proper and lawful investigation into the allegations of the misuse of scanners by McKinley and his colleagues. It has been undisputed throughout these proceedings that the questions asked of McKinley were narrowly tailored to his employment as a police officer and the City never asked him to waive his Fifth Amendment privilege.

The Sixth Circuit has bypassed the entire line of this Court's decisions from *Garrity* through *Cunningham* by

declaring that the City and its officials may be found to have violated the Fifth Amendment and may face civil liability pursuant to § 1983 for taking lawful and valid *Garrity* interviews of McKinley. Under *Garrity*, *Gardner*, and *Cunningham*, the performance of an investigation alone cannot give rise to a Fifth Amendment claim by McKinley. The Sixth Circuit held that the City and its officials may be civilly liable, not because of their own actions, but because an independent prosecutor subsequently used McKinley's *Garrity* statements in his criminal trial. This ruling directly conflicts with *Garrity*, *Gardner*, and *Cunningham* because it holds that the investigatory interview that those decisions declared constitutionally valid can nonetheless serve as a basis for a § 1983 action against the municipality and its officials that conducted the interview.

B. Contrary to the Sixth Circuit's holding, this Court has confirmed that a municipal employer may not face civil liability for the act of producing immunized statements to a prosecutor.

This Court's decision in *Kastigar v. United States*, 406 U.S. 441 (1972) establishes that the City's disclosure of McKinley's statements to the Special Prosecutor cannot serve as the basis for § 1983 liability. The City had every right to disclose to the Special Prosecutor for his evaluation and possible action evidence of criminal wrongdoing by its own police officers in the performance of their official duties. This Court recognized that governmental right in *Kastigar* when it refused to declare unconstitutional the production to a prosecutor of a defendant's *Garrity* statement and, instead, created a prophylactic safeguard to address precisely that situation. In *Kastigar*, this Court held that, once a prosecutor has obtained a *Garrity* statement, the defendant may request a hearing at which the prosecutor must prove that the

evidence on which he relies was derived from a source independent of the defendant's immunized *Garrity* statements. 406 U.S. 461-62. *Kastigar* expressly contemplates that a prosecutor may legally obtain a defendant's *Garrity* statements.

Moreover, the Ninth Circuit directly addressed the issue whether a municipality may constitutionally turn over statements protected by "use immunity." It rejected an attempt by police officers to block disclosure of their internal affairs statements to a grand jury:

> When a statement has been compelled by immunity, the focus then shifts to the *use*, rather than the *obtaining*, of the witness's statement. Cases have defined the application of the Fifth Amendment in a setting of compelled testimony. Those cases include *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972); *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967); and *In re Grand Jury Proceedings* (Kinamon), 45 F.3d 343 [(9th Cir. 1995)] . . . . We hold that the protection of the Fifth Amendment privilege, when applied to statements by police officers in internal affairs files, must focus on the use of those statements against the officers who gave them. The statements are not privileged from production to a subpoenaing authority. But the Fifth Amendment guards against any improper use of them.

In re Grand Jury Subpoena, 75 F.3d 446, 448 (9th Cir. 1996). *Accord In re Grand Jury Subpoena*, 40 F.3d 1096, 1097 (10th Cir. 1994) (presentation to a grand jury of a police officer's compelled statement taken pursuant to an internal affairs investigation does not constitute a violation of the

officer's Fifth Amendment right against self-incrimination). Because the Sixth Circuit's decision in this action provides that the disclosure of McKinley's *Garrity* statements to the Special Prosecutor may serve as a basis for civil liability, it is in direct conflict with the Ninth Circuit's decision as well as this Court's controlling precedent.

C. Contrary to the Sixth Circuit's decision, this Court has held that a municipal official may not face civil liability for actions he performs as a witness in a criminal trial.

The plain language of 42 U.S.C. § 1983 limits civil liability in actions such as this to the "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution." *Baker v. McCollan*, 443 U.S. 137, 142 (1979). The persons who allegedly "caused" the violation of McKinley's Fifth Amendment rights were the Special Prosecutor who presented the challenged evidence at trial, and the investigating officer, Petitioner Lt. Dale Fortney, who took the challenged *Garrity* statements from McKinley and testified at the Special Prosecutor's direction. *Crowe v. County of San Diego*, 303 F. Supp. 2d 1050, 1091-92 (S.D. Cal. 2004) (citing *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)).

It is axiomatic that both the prosecutor and the witness who testifies at his direction enjoy absolute immunity against claims relating to those functions, and a § 1983 action will not lie against either based on his actions at trial. *Briscoe v. LaHue*, 460 U.S. 325, 341-45 (1983) (a police officer has absolute immunity from § 1983 claims for his testimony). *See also Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993);

Burns v. Reed, 500 U.S. 478, 485-86 (1991); *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). The Sixth Circuit's pronouncement that Lt. Fortney's trial testimony regarding McKinley's admissions while "under *Garrity*" can form the basis for civil liability pursuant to § 1983 directly conflicts with this Court's holding in *Briscoe*.

D. Contrary to the Sixth Circuit's decision, this Court has held that the pretrial actions of a government entity may not serve as the basis for § 1983 liability unless those actions violate the plaintiff's due process rights under the Fourteenth Amendment and otherwise "shock the conscience."

The Sixth Circuit's decision also conflicts with this Court's decision in *Chavez v. Martinez*, 538 U.S. 760 (2003). The plurality in *Chavez* plainly announced that "[t]he privilege against self-incrimination guaranteed by the *Fifth Amendment* is *a fundamental trial right* of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial.*" *Id.* at 767 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)).

Pretrial actions by law enforcement officers, in the absence of conduct which "shocks the conscience" and violates the substantive due process protections of the Fourteenth Amendment, do not violate the Fifth Amendment and cannot support a claim for compensation under § 1983. *Chavez*, 538 U.S. at 772-73 (Thomas, J., with Rehnquist, C.J.), at 777-79 (Souter, J., concurring). *Accord Burrell v. Virginia*, 395 F.3d 508, 513-14 (4th Cir. 2005); *United States v. Antelope*, 395 F.3d 1128, 1140 (9th Cir. 2005); *DeShawn E. v. Safir*, 156 F.3d 340, 346 (2d Cir. 1998). It simply cannot be said that the City's pretrial actions violated the

Fourteenth Amendment and "shocked the conscience," because, as discussed above, the City did nothing but perform a *Garrity* interview, which this Court has declared constitutionally proper.

As Justice Thomas wrote in *Chavez*, "the official conduct 'most likely to rise to the conscience-shocking level,' is the 'conduct intended to injure in some way unjustifiable by any government interest.'" *Chavez*, 538 U.S. at 775 (Thomas, J., with Rehnquist, C.J.) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)). McKinley was never injured or subjected to brutality during his *Garrity* interview, and therefore a § 1983 claim based on a violation of the Fifth Amendment is simply not viable under *Chavez*. Moreover, the Sixth Circuit did not find, and McKinley has never claimed, that the City asked him any questions that were not "specifically, directly, and narrowly relating to the performance of his official duties" or that it ever asked him to waive his Fifth Amendment immunity. Accordingly, the City's conduct during McKinley's *Garrity* interviews was not in violation of any constitutional rule, let alone "conscience-shocking." As a result, the Sixth Circuit's decision is in conflict with *Chavez* because it holds that the City and its officials can be liable under § 1983 for pretrial actions that do not violate the Fourteenth Amendment.

Furthermore, there are prophylactic safeguards in place to protect against the violation of an officer's Fifth Amendment rights subsequent to a *Garrity* interview, thus making redress pursuant to § 1983 unnecessary. This Court's holding in *Kastigar* requires the prosecution to prove at hearing that the source for all of its evidence is independent of the defendant's immunized statements. *Kastigar*, 406 U.S. at 461-62 (1972). *See also In re Grand Jury Subpoena*, 75 F.3d 446, 448 (9th Cir. 1996); *United States v. Bartel*, 19 F.3d 1105, 1111-12

(6th Cir. 1994). These procedural protections, which are afforded a police officer whose incriminating statements have been compelled through a grant of use immunity, guarantee that his constitutional rights will remain inviolate. *In re Grand Jury Subpoena*, 40 F.3d 1096, 1104 (10th Cir. 1994).

Moreover, it should be noted that McKinley was not left without a remedy for the violation of his Fifth Amendment rights that occurred when Special Prosecutor Knowling introduced his *Garrity* statements at his criminal trial. Simply stated, the remedy for a violation of the right against self-incrimination is "the exclusion from evidence of any ensuing self-incriminating statements" and "not a §1983 action." *DeShawn E.*, 156 F.3d at 346 (quoting *Neighbor v. Covert*, 68 F.3d 1508, 1510 (2d Cir. 1995) (per curiam)). McKinley therefore was granted his remedy when his conviction was reversed and the charges against him dismissed. Because the Sixth Circuit's split decision authorizes a right of action under § 1983 which this Court in *Garrity*, *Gardner*, *Cunningham*, and *Chavez* has rejected, this Court should grant the Writ of Certiorari.

II. THIS IS A MATTER OF NATIONAL IMPORTANCE BECAUSE A MUNICIPALITY'S ABILITY TO INVESTIGATE OFFICIAL MISCONDUCT BY PUBLIC EMPLOYEES DIRECTLY AFFECTS ITS ABILITY TO MAINTAIN PUBLIC CONFIDENCE AND ENSURE THE INTEGRITY AND EFFICIENCY OF ITS POLICE FORCE.

A. This matter is of national importance because it adversely affects the "effective functioning of government" and the public's trust in its officials.

This matter is of national importance because "[i]t is true that the State has a strong, legitimate interest in maintaining the integrity of its civil service." *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973). "The importance for our systems of justice of the integrity of local police forces can scarcely be exaggerated." *Garrity*, 385 U.S. at 507-08 (Harlan, J., dissenting). Moreover, a municipality and the public it serves have the right to obtain information "to assure the effective functioning of government." *Turley*, 414 U.S. at 82 (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 93 (1964) (White, J., dissenting)) *See also Sugarman v. Dougall*, 413 U.S. 634, 641-42 (1973) (referencing public employer's interest in maintaining "the integrity and efficiency of the operations of government").

In accordance with these legitimate public interests, government entities, without risk of civil liability, must be free to require public employees to account for the actions they perform in the public trust. *Cunningham*, 431 U.S. at 806. *See also Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280, 285 (1968) ("[Plaintiffs], being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust,

after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.").

The obvious result of the Sixth Circuit's ruling is that the use of *Garrity* interviews will be largely eliminated, if not abandoned altogether, by government officials who fear the prospect of civil liability. By vitiating *Garrity* and its progeny, the ruling creates uncertainty for municipal employers. A municipal employer has no way to control - or even to know - whether an independent prosecutor will later use an otherwise constitutionally-obtained *Garrity* statement against an employee at a subsequent criminal trial, and, by doing so, create liability for the municipal employer and its officials for a violation of the Fifth Amendment.
In short, as a result of the Sixth Circuit's decision, there is no way for a municipality to avoid liability while investigating official misconduct except to forego *Garrity* interviews. The abandonment of *Garrity* interviews, of course, will adversely affect the legitimate interests of the government and the public in maintaining the integrity of its civil servants and ensuring the effective functioning of government and the public trust. *See Turley*, 414 U.S. at 82 (stating that *Garrity* and its progeny "ultimately rest on a reconciliation of the well-recognized policies behind the privilege of self-incrimination, and the need of the State, as well as the Federal Government, to obtain information "to assure the effective functioning of government") (citations omitted). Accordingly, this is a matter of great national importance which this Court should consider on the merits.

B. This matter is of national importance because it exposes government entities to civil liability in any case in which a witness or employee is granted immunity for his compelled statements.

The Sixth Circuit's decision affects every situation in which a government entity seeks to compel a witness to respond to questioning through the granting of use immunity. The Sixth Circuit's decision may reach beyond the scope of this case and result in the imposition of liability on a government entity, not only for conducting *Garrity* interviews, but for questioning any witness whose statements are accorded use immunity.

The concept of "use immunity" typically is invoked under 18 U.S.C. § 6002, which provides that a witness may be compelled and granted immunity to answer questions in federal court or before Congress. The witness's statements, like those of an officer subjected to a *Garrity* interview, are granted use immunity, but he may not otherwise refuse to answer. 18 U.S.C. § 6002 ("[T]he witness may not refuse to comply with the order on the basis of his privilege against self-incrimination."). Should a prosecutor subsequently use the immunized statements in a criminal trial against the witness, the situation would be identical to the instant case, and, pursuant to the Sixth Circuit's ruling, the witness potentially could recover monetary damages against the government entity and officials who directed that the witness be compelled to respond to questioning. Such a result is contrary to this Court's jurisprudence and would diminish the ability of governmental agencies to investigate criminal wrongdoing.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

Richard P. Goddard
Counsel of Record

Jeffrey J. Lauderdale
Calfee, Halter & Griswold LLP
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, Ohio 44114-2688
(216) 622-8200

Counsel for Petitioners
Dated October, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-4258

[Filed July 19, 2005]

JEFFREY MCKINLEY, Plaintiff-Appellant,	)
v.	)
CITY OF MANSFIELD, ET AL., Defendants-Appellees.	)

BEFORE: KEITH, CLAY, and BRIGHT,* Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having

* Hon. Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-4258

[Filed April 11, 2005]

JEFFREY MCKINLEY, Plaintiff-Appellant,

v.

CITY OF MANSFIELD, ET AL., Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland
No. 02-02339
Dan A. Polster, District Judge

BEFORE: KEITH, CLAY, and BRIGHT,* Circuit Judges.

* Hon. Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

OPINION

CLAY, Circuit Judge. Plaintiff Jeffrey McKinley, a former police officer in Mansfield, Ohio, appeals the judgment of the district court granting summary judgment to Defendants the City of Mansfield (the "City") and five of its police officers and officials.[1] The district court granted summary judgment on the grounds that McKinley had failed to establish a genuine issue of material fact as to either of the federal constitutional claims he brought in this action under 42 U.S.C. § 1983. McKinley alleges that, in the course of an internal investigation into City police officers' misuse of their radio scanners to invade citizens' privacy, the City and its police officials (1) compelled him to be a witness against himself in violation of the Fifth Amendment to the United States Constitution and (2) maliciously prosecuted him in violation of the Fourth Amendment. The district court dismissed McKinley's state law claims without prejudice.[2] We AFFIRM the district court's entry of summary judgment as to McKinley's malicious prosecution claim. But as to McKinley's Fifth Amendment claim, we REVERSE and REMAND to the district court for proceedings consistent with this opinion.

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[1] McKinley named as defendants the following individuals in their individual and official capacities: Lawrence Harper, the City's police chief during the events of this case; Ronald Kruder, the City's Safety Director; Philip Messer, a City police captain during the events of this case and the current police chief; and Dale Fortney, a police lieutenant detective during the events of this case.

[2] McKinley's state law claims include: false arrest, abuse of process, intentional infliction of emotional distress, and breach of contract. *See* Joint Appendix ("J.A.") at 13-15 (Compl.).

BACKGROUND

The following facts are viewed, as they must be, in the light most favorable to McKinley. On February 3, 2000, McKinley, a patrol officer for the Mansfield Police Department, observed an intoxicated William Noble urinating in a parking lot. Advised earlier in the day by his supervisor that all patrol officers were to issue summonses due to overcrowding at the city jail, McKinley began writing Noble a ticket. In the meantime, Noble made a cell phone call in his car as two of McKinley's colleagues, Sgt. David Nirode and officer Gary Foster, arrived on the scene. Upon his arrival, Foster told McKinley and Nirode that he overheard Noble's cell phone call on his police scanner.[3] After Foster described the substance of the phone call to McKinley and Nirode, McKinley arrested and incarcerated Noble for public indecency and intoxication.

The Scannergate Investigation & Garrity *Immunity*

In late February 2000, Defendant Harper, the chief of police, directed Defendant Messer, a captain on the force, to oversee an investigation into officers' misuse of scanners. Harper launched the investigation after hearing several reports of officers using scanners to eavesdrop on citizens' phone calls; the investigation became known as "scannergate." Ultimately, the investigation would involve interviews of more than thirty police officers, searches of officers' lockers, and interviews of some civilians. Messer placed Lieutenant Detective Dale Fortney, also a defendant in this case, in

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[3] McKinley at one point denied that this conversation occurred but later admitted it in an interview with police that he challenges here on Fifth Amendment grounds.

command of the investigation and directed Fortney to interview certain officers, including McKinley. Fortney and his colleague, Lt. Goldsmith, conducted two interviews of McKinley, the first on February 25, 2000 (the "first interview"), and the second on March 7, 2000 (the "second interview"). Prior to the first interview, McKinley read and acknowledged the following statement in writing:

ADMINISTRATIVE PROCEEDINGS
INTERNAL AFFAIRS UNIT

> You are hereby advised that you are about to be questioned as part of an official administrative investigation of the Division of Police. You will be asked specific question (sic) which will relate directly and narrowly to the performance of your official duties or fitness as an employee or member of the Division of Police. The purpose of this interview is to assist in determining whether disciplinary action is warranted, and the answers furnished may be used in disciplinary proceedings that could result in administrative action against you.
>
> Because this is an administrative and not a criminal investigation, the Division of Police will not use any of the answers or information gained from the interview in any criminal proceeding against you. Further, the Division of Police will not release this information to any other agency without your approval and will hold it as confidential, except as mandated by an appropriate and competent authority or as necessary for disciplinary proceedings and appeals of such proceedings.

> You are further advised that you are hereby ordered and required to fully and truthfully answer all questions asked of you in this interview.
>
> Your failure to comply with this order constitutes your being in violation of the Rules and Regulations of the Division of Police . . . .

(J.A. at 71). At Fortney's behest, McKinley added: "I am giving the following statement by reason of an order from a superior officer, advising me that refusal to obey could result in disciplinary action. . . . However, it is my belief and understanding that the Division of Police requires this statement solely and exclusively for internal administrative purposes . . . ." *Id.* at 73. These promises of use immunity are consistent with the long-established rule that when a public employer conducts an internal investigation it may dismiss an employee who refuses to answer investigative questions, but it may not use any incriminating statements against the employee in a criminal prosecution regarding the matter under investigation. *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967).

In the first interview, Fortney asked McKinley about officers' use of scanners to eavesdrop and about the events of February 3, 2000, including the Noble phone call. McKinley claimed to have no knowledge of the alleged scanner misuse and denied that Foster or anyone else divulged the substance of the Noble call to him. McKinley affirmed the truth of his answers by providing a sworn signature on the interview transcript. The day before, Fortney had taken a statement from Nirode, who represented that Foster overheard Noble's phone call by using his scanner and then related the contents of the call to Nirode and McKinley. Four days after McKinley's first interview, Fortney took a statement from

Noble, who confirmed that he had in fact made a cell phone call on February 3 during the minutes preceding his arrest. Apparently due to the inconsistencies between McKinley's first statement and the statements of Nirode and Noble (who only confirmed that a call occurred), Fortney decided to re-interview McKinley.

The second interview in reality consisted of a pre-interview session, which Fortney and Goldsmith did not record, and a recorded interview covering the same topics as the first interview. During the unrecorded pre-interview session - which lasted approximately 10-15 minutes and took place in a different room - Fortney and Goldsmith advised McKinley that they suspected him of lying in the first interview and that they were giving him another chance to tell the truth.[4] In addition, they offered that a union representative, officer Daniel Martincin, be present for the interview.[5] Fortney and Goldsmith did not provide the written Internal Affairs Administrative Procedures statement, *see supra*, as they had at the first interview; however, Fortney advised McKinley that he was "still under *Garrity*", i.e., that just as in the first interview, "if he said things that incriminated himself . . . those could not be used against him [criminally]." J.A. at 185 (Fortney Depo.). Finally, at the

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[4] In his deposition, Fortney recounted: "I just told [McKinley] that it was obvious, you know, to us that he was lying and we were going to give him another chance, you know, to, even if we had to we could parade about six officers in that could tell different stories than he was telling. He needs to tell the truth and he's still under *Garrity*, he needs to tell the truth and take his chances." J.A. at 184-85 (Fortney Depo.). McKinley does not dispute this characterization of the pre-interview.

[5] Officer Martincin is not an attorney.

close of the pre-interview, Goldsmith read the following statement into the tape recorder:

> Today's date is Tuesday, March 7th, 2000. . . . We've called Jeff McKinley back out to be re-interviewed. He has been advised that he's still under *Garrity*. He was asked if he wanted a rep. present. He stated that he did and Dan Martincin came to the Special Investigative Unit and sat on the pre-interview. We are preparing now to re-interview Jeff McKinley and we'll go over the statement form that he gave to the investigating officers on 2/25/00. It's been determined prior to this interview that he was not truthful at the time he gave the interview on 2/25/00. He will be asked, again, the same questions and will give his responses.

(J.A. at 84.)

The interview then began. McKinley does not dispute that he said the things that were recorded, but alleges that the tape and transcript of the interview do not accurately reflect *all* of what he said. Specifically, McKinley alleges, and Fortney admits, that Fortney and Goldsmith selectively recorded McKinley's answers; when the officers suspected that an answer was false, they would stop the tape, confront McKinley with their suspicion, and suggest that he give a truthful answer. The officers would then rewind the tape to the end of the prior question-and-answer exchange and re-ask the question that prompted the objectionable answer. Consequently, the tape recording and transcript of the second interview omit some or all of the answers Fortney and Goldsmith deemed false and the answers that are reflected on the recording and transcript contradict much of what McKinley said in his first interview. Specifically, McKinley

admitted to using his own scanner between 1995 and 1998 to eavesdrop on cordless and cell phone calls; offered a detailed account of other officers' use of scanners to do the same; and admitted that Foster had overheard the Noble call and relayed its substance to him and Nirode. But McKinley denied arresting Noble on the basis of his conversation with Foster, instead maintaining that he arrested Noble prior to Foster's arrival and incarcerated Noble pursuant to Nirode's representation that the jail was no longer full.

Sometime after McKinley's second interview, Fortney and Messer concluded the scannergate investigation and turned over the information they had gathered - including McKinley's statements - to Stephen Knowling, the Prosecuting Attorney for Holmes County, Ohio. Knowling is not a defendant herein. The Mansfield Police Department took immediate action against McKinley, first suspending him, then terminating him. Pursuant to the police officers' collective bargaining agreement with the Department, McKinley's case went to arbitration. Finding McKinley's termination disproportionate to the punishments meted out on other officers, the arbitrator ordered that McKinley be re-instated with back pay and benefits.

The State Criminal Proceedings Against McKinley

Prosecuting Attorney Knowling charged McKinley with falsification, a violation of OHIO REVISED CODE § 2921.13[6]; obstruction of official business, a violation of

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[6] Ohio's Falsification statute provides, in relevant part: "No person shall knowingly make a false statement, or knowingly swear or affirm the truth of a false statement previously made, when any of the following applies: (1) the statement is made in any official proceeding. . . . (3) The statement is made with purpose to mislead

O.R.C. § 2921.31[7]; and interference with civil rights, a violation of O.R.C. § 2921.45. On April 11, 2000, pursuant to a summons, McKinley appeared in Mansfield Municipal Court to answer the charges. McKinley moved to dismiss the civil rights charge and the court granted the motion. Still facing the other two charges, McKinley further moved to suppress the statements recorded in his two interviews, but the court declined to do so. On July 26, 2001, after a one-day trial in which the inconsistent statements McKinley made during the two interviews played the central role - the prosecutor introduced McKinley's statements through Officer Fortney - a jury convicted him on two counts of falsification and one count of obstructing official business.

On June 25, 2002, the Richland County Court of Appeals vacated McKinley's conviction on the ground that it was error for the trial court to admit McKinley's statements. *See State v. McKinley*, 2002 Ohio 3825, 2002 WL 1732136 (Ohio Ct. App. 2002). The court considered but rejected McKinley's claim that the statements were inadmissible by virtue of the Fifth Amendment as interpreted by *Garrity*. Instead, the court based its holding of inadmissibility on its conclusion that the parties entered a contract whereby McKinley agreed to answer truthfully, and Fortney and the Police Department

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a public official in performing the public official's official function." O.R.C. § 2921.13(A)(1) & (3).

[7] Ohio's Obstruction of Official Business statute provides, in relevant part: "No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties." O.R.C. § 2921.31(A).

agreed not to use his statements in a prosecution against him. Interpreting the contract to preclude use of the statements in *any* prosecution, even a prosecution for lying during the interviews and obstructing the department's lawful investigation, the court reversed the trial court's decision to admit the statements and vacated McKinley's convictions.

McKinley's § 1983 Action

On November 27, 2002, McKinley filed a complaint in district court asserting claims under 42 U.S.C. § 1983 and several common law causes of action. The complaint named as defendants the city of Mansfield, Ohio, and certain of its police officials, including Lt. Fortney and then-captain now-chief Messer. This appeal is confined to the two constitutional claims McKinley brought under § 1983: (1) that Defendants maliciously prosecuted him in violation of the Fourth Amendment; and (2) that Defendants violated his Fifth Amendment "rights to be free from self incrimination" by compelling him in the second interview to make incriminating statements as to falsification and obstruction, which statements were later used at his trial for those crimes. Brief of Appellant at 3-4. On February 10, 2003, Defendants filed a motion for summary judgment. In response, McKinley filed a motion for leave to conduct discovery and to hold in abeyance a decision on Defendants' summary judgment motion. The district court granted very limited discovery, permitting McKinley to depose Defendant Fortney only and restricting the topic of the deposition to the second interview. At the conclusion of discovery, McKinley filed (1) a response to Defendants' motion for summary judgment, (2) a motion to strike the transcript of the second interview from Defendants' summary judgment motion, and (3) a motion for sanctions. Defendants replied with their own cross motion for sanctions.

The court denied McKinley's motion to strike and denied both parties' motions for sanctions. The district court granted summary judgment in Defendants' favor, dismissing without prejudice Plaintiff's state law causes of action.

STANDARD OF REVIEW

This Court reviews a district court's decision to grant summary judgment *de novo*. *E.g.*, *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1048 (6th Cir. 2001). Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The district court, and this Court in its review of the district court, must view the facts and any inferences reasonably drawn from them in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Accordingly, we view the facts in the light most favorable to McKinley.

DISCUSSION

I. Compelled Self-Incrimination

Before proceeding to our analysis of what McKinley challenges under the Fifth Amendment, we note what he does *not* challenge. McKinley accepts the general rule that the Fifth Amendment permits the government to use compelled statements obtained during an investigation if the use is limited to a prosecution for collateral crimes such as perjury or obstruction of justice. *See United States v. Wong*, 431 U.S. 174, 178, 97 S. Ct. 1823, 52 L. Ed. 2d 231 (1977) ("The

Fifth Amendment privilege does not condone perjury."); *see also United States v. Apfelbaum*, 445 U.S. 115, 131, 100 S. Ct. 948, 63 L. Ed. 2d 250 (1980) (holding that "[n]either the [federal use] immunity statute nor the Fifth Amendment precludes the use of respondent's immunized testimony at a subsequent prosecution for making false statements"); *United States v. Mandujano*, 425 U.S. 564, 576, 96 S. Ct. 1768, 48 L. Ed. 2d 212 (1976) ("In this constitutional process of securing a witness' testimony, perjury simply has no place whatsoever."). This rule applies with equal force when the statements at issue were made pursuant to a grant of *Garrity* immunity during the course of a public employer's investigation of its own. *See United States v. Veal*, 153 F.3d 1233, 1243-44 (11th Cir. 1998), *cert. denied*, 526 U.S. 1147, 119 S. Ct. 2024, 143 L. Ed. 2d 1035 (1999). As a matter of Fifth Amendment right, *Garrity* precludes use of public employees' compelled incriminating statements in a later prosecution for the conduct under investigation. *Garrity*, 385 U.S. at 500. However, *Garrity* does not preclude use of such statements in prosecutions for the independent crimes of obstructing the public employer's investigation or making false statements during it. *See Veal*, 153 F.3d at 1243-44.

Consequently, McKinley acknowledges that the statements he made during the course of the first interview with Fortney and Goldsmith, while off limits in any subsequent prosecution regarding the scannergate crimes, were fair game for his falsification and obstruction prosecutions. But the statements he made at the *second* interview, McKinley suggests, are of an entirely different character. No longer a mere *Garrity* witness, McKinley alleges that by the time of the second interview on March 7, he was the target of a falsification and obstruction investigation. *See* Brief of Appellant at 42-45. After assuring McKinley that his second interview would be conducted according to the same rules as the first, i.e., that

the promise of *Garrity* immunity remained in effect, McKinley alleges that Fortney and Goldsmith compelled him to make statements that incriminated him vis-à-vis the crimes of falsification and obstruction. Then, despite the officers' promise of *Garrity* immunity, these statements were used against him at a trial for falsification and obstruction - a straightforward violation, McKinley asserts, of the Fifth Amendment. The record is clear that the manner of compulsion, while not physical coercion, was nonetheless severe: if McKinley refused to answer, he would face departmental disciplinary proceedings and termination of employment.

The district court dismissed McKinley's reasoning on several grounds. First, the court concluded, "[i]t is the Special Prosecutor who used the transcripts to establish the state's case against him - not defendants." J.A. at 273. (Dist. Ct. Op.) Without evidence that Defendants participated in the Prosecutor's decision, or induced him to rely on the allegedly coerced statements, the court rejected as a matter of law McKinley's theory of police liability. As a second rationale for rejecting McKinley's claim, the court explained that the Ohio Court of Appeals's decision precluded any further adjudication on the issue of whether *Garrity* prohibited the use of McKinley's statements at his criminal trial. The Ohio court determined that *Garrity* itself did not prohibit trial use of the statements - because the prosecution was for false statements and obstruction, not scannergate - but found for McKinley on contractual immunity grounds. *See State v. McKinley*, 2002 Ohio 3825, 2002 WL 1732136 (Ohio Ct. App. 2002).

Finding itself bound by the Ohio court's reading of *Garrity* - on the theory that McKinley could not use his § 1983 civil action to re-litigate issues decided in his state criminal case - the district court rejected McKinley's claim on this basis as well. Finally, the court concluded that McKinley's claim would fail on the merits in any event because he could show no violation of *Garrity* or the Fifth Amendment, let alone a violation of a clearly established constitutional right. The basis for this conclusion was that *Garrity* permits use of employer-compelled statements in a later false statement and obstruction prosecution. The court apparently declined to address McKinley's primary argument - that his role in the second interview was that of a falsification and obstruction suspect, rather than a traditional *Garrity* informant, and therefore that it was a violation of the Fifth Amendment to use his compelled statements from the second interview at the false statement and obstruction trial.

A.

Initially, we must determine whether, as the district court held, McKinley is precluded from making his Fifth Amendment claim in this § 1983 action because the Ohio Court of Appeals rejected the claim in his state criminal appeal.[8] *See State v. McKinley*, 2002 Ohio 3825, 2002 WL 1732136 (Ohio Ct. App. 2002) (unpublished opinion).

As a general rule, a federal civil action brought under

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[8] The district court raised the issue of collateral estoppel *sua sponte*. *See* J.A. at 278 (Dist. Ct. Op.). Because we conclude that collateral estoppel does not bar McKinley from raising his Fifth Amendment claim here, we do not consider whether the district court's decision to raise the question *sua sponte* was erroneous.

§ 1983 is not a venue for re-litigating issues that were decided in a prior state criminal case. *See Allen v. McCurry*, 449 U.S. 90, 103-105, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980) (holding that the principles of collateral estoppel and res judicata apply in § 1983 actions). Because McKinley's state proceedings occurred in Ohio, we must consult Ohio's law of collateral estoppel (also known as "issue preclusion") to determine whether the state appeals court's decision precludes us from considering McKinley's Fifth Amendment claim. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984) (instructing federal courts to apply the collateral estoppel law of the state which issued the prior judgment); *see also Haring v. Prosise*, 462 U.S. 306, 313-316, 103 S. Ct. 2368, 76 L. Ed. 2d 595 (1983) (same); 28 U.S.C. § 1738 (federal courts must give full faith and credit to state court judgments).

In Ohio, "issue preclusion precludes the relitigation of an issue that has been actually and necessarily litigated and determined in a prior action." *MetroHealth Med. Ctr. v. Hoffmann-Laroche, Inc.*, 80 Ohio St. 3d 212, 1997 Ohio 345, 685 N.E.2d 529, 533 (Ohio 1997) (internal quotation marks and citations omitted).[9] We cannot bar McKinley from asserting his Fifth Amendment claim unless the Ohio appeals court considered the "identical" claim and the court's

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[9] We observe that this understanding of collateral estoppel is consonant with the Supreme Court's view of the doctrine as it applies in the § 1983 arena. As the Court put it in *Allen*: "Under collateral estoppel, once a court has decided an issue or fact *necessary to its judgment*, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen*, 449 U.S. at 94 (emphasis added) (citing *Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)).

rejection of the claim was "essential [to its] judgment." *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St. 3d 193, 2 Ohio B. 732, 443 N.E.2d 978, 985 (Ohio 1983). The Ohio Court of Appeals vacated McKinley's falsification and obstruction convictions on the limited grounds that the state's use of his statements at the trial for those crimes constituted a breach of the police department's promise not to use "any of [his] answers . . . from the interview . . . in any criminal proceeding." *McKinley*, 2002 Ohio 3825 at P16, 2002 WL 1732136, at *3 (quoting the departmental warning Fortney provided to McKinley). While it is true that the court concluded that *Garrity*, as opposed to the police department's more generous immunity contract, would permit use of the statements at a trial for falsification and obstruction, *see* 2002 Ohio 3825 at P16, [WL] at *2-*3, this conclusion was in no sense "essential" to its judgment, the essence of which was that McKinley's convictions were invalid on contractual immunity grounds. *See Goodson*, *supra*, at 985. Indeed, the Ohio appeals court's comments regarding *Garrity* were mere *dicta*. Accordingly, we hold that McKinley may raise his Fifth Amendment claim in this action.

B.

Section 1983 authorizes anyone deprived of her federal constitutional or statutory rights by state officials to bring a civil action for damages against such officials. 42 U.S.C. § 1983. However a defendant in a § 1983 action may raise the affirmative defense of qualified immunity, which "shields 'government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known.'" *Gardenhire v. Schubert*, 205 F.3d 303, 310-11 (6th Cir. 2000) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102

S. Ct. 2727, 73 L. Ed. 2d 396 (1982)).

But as a pre-cursor to the *Harlow* qualified immunity analysis, a court must first determine whether *any* constitutional violation occurred, let alone the violation of a clearly established right. *E.g.*, *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001); *Jackson v. Leighton*, 168 F.3d 903, 909 (6th Cir. 1999). Consequently, if we find no constitutional violation, then the case must be dismissed at this threshold stage because § 1983 is inapplicable on its face. *Katz*, 533 U.S. at 201; *see also* 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . *subjects, or causes to be subjected*, any citizen of the United States . . . *to the deprivation of any rights . . . secured by the Constitution* . . . shall be liable.") (emphasis added). Where a constitutional violation exists, the court must next determine whether the right infringed was clearly established - by decisions of the Supreme Court, this Court, or other Courts of Appeal - at the time the defendant allegedly infringed it. *See Higgason v. Stephens*, 288 F.3d 868, 876 (6th Cir. 2002) (citing *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993)). Finally, if the right is clearly established, we cannot impose liability on a state official unless "the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional right[]." *Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir. 1999) (*en banc*) (citing *Dickerson v. McClellan*, 101 F.3d 1151, 1157-58 (6th Cir. 1996)). We now consider McKinley's Fifth Amendment claim and whether any of the defendants are entitled to qualified immunity.

C.

We conclude that there is a genuine issue of material fact as to whether, at the time of McKinley's second interview, he was the target of an independent falsification and obstruction investigation, and no longer a mere *Garrity* witness. We conclude that there is also a genuine issue of material fact as to whether Defendants compelled McKinley to make statements that would incriminate him as to the crimes of falsification and obstruction. If McKinley was in fact a target of such an investigation, and if Fortney and Goldsmith in fact forced him to make the incriminating statements[10] later used against him in his trial for falsification and obstruction, he was "compelled in [a] criminal case to be a witness against himself." U.S. CONST. amend V.

This core protection against forced self-incrimination, binding on the federal government by virtue of the Fifth Amendment itself, is applicable to the states by virtue of the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). While the Supreme Court has devised procedural safeguards to guard against forced self-incrimination before judicial proceedings begin, *see Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and while until recently courts interpreted the Fifth Amendment to prohibit coercive questioning *ipso facto*, *see Cooper v. Dupnik*, 963 F.2d

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[10] Lest there be any confusion regarding whether McKinley's answers in the second interview in fact incriminated him as to the crimes of falsification and obstruction, we observe that he not only provided answers that materially contradicted his earlier answers but also expressly admitted being untruthful in the first interview and doing so with the purpose of protecting fellow officers. *See* J.A. at 89-94 (transcript of second interview).

1220, 1242-44 (9th Cir.) (*en banc*), *cert. denied*, 506 U.S. 953, 113 S. Ct. 407, 121 L. Ed. 2d 332 (1992) (sustaining a § 1983 action against police officers even though the plaintiff's coerced statements were not used at any proceeding), it is now clear that "mere coercion does not violate the . . . Self-Incrimination Clause absent use of the compelled statements in a criminal case." *Chavez v. Martinez*, 538 U.S. 760, 769, 123 S. Ct. 1994 155 L. Ed. 2d 984 (2003) (plurality opinion).[11] It is only once compelled incriminating statements are used in a criminal proceeding, as a plurality of six justices held in *Chavez v. Martinez*, that an accused has suffered the requisite constitutional injury for purposes of a § 1983 action.[12] *Id.* at 769, 772-73. *See also Lingler v. Fechko*, 312 F.3d 237, 238-40 (6th Cir. 2002) (finding no Fifth Amendment violation sufficient to sustain a § 1983 action where police officer-employees who had made incriminating statements in compulsory interviews with superiors were never prosecuted). In this case, it cannot be disputed that McKinley's statements from the second interview were used as evidence against him at trial. J.A. at 165 (trial transcript).

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[11] The *Chavez* decision may leave room for a challenge to the use of coerced statements in a grand jury proceeding, *see Chavez*, 538 U.S. at 766-67 (declining to decide when a "criminal case" begins), however the thrust of the opinion rests on the view that the Fifth Amendment is a trial protection. *Id.* at 766-68.

[12] Agreeing on this specific holding were Chief Justice Rehnquist and Justices Thomas, O'Connor, Scalia, Souter, and Breyer. *See id.* at 763, 773 (Op. of Thomas, J., joined by Rhenquist, C.J., and O'Connor and Scalia, J.J.); *id.* at 777-79 (Op. of Souter, J., joined by Breyer, J.).

Yet to prevail at the summary judgment stage in this § 1983 action, McKinley must also show that the statements are legally entitled to Fifth Amendment protection in the first place, i.e., that there was in fact a violation of his Fifth Amendment right to be free from forced self-incrimination; and, moreover, that the named defendants are proper defendants, i.e., that they caused the Fifth Amendment violation in question. *See, e.g., Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)(holding that a § 1983 plaintiff must first identify and prove that a deprivation of constitutional magnitude occurred); *Baker v. McCollan*, 443 U.S. 137, 142, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979) (holding that § 1983 reaches only those public officials who *cause* deprivations of constitutional rights); 42 U.S.C. § 1983 (making liable "every person who . . . *subjects, or causes to be subjected*, any citizen of the United States [to the deprivation of any constitutional right]") (emphasis added). The district court rejected McKinley's claim on both grounds. The court held that Defendants did not violate McKinley's Fifth Amendment rights because the Fifth Amendment's protection against forced self-incrimination does not extend to perjury or false statements. The court further held that in any event, even if any of the defendants had compelled McKinley to incriminate himself, it is only prosecutors who "use" suspects' incriminating statements against them in criminal proceedings; consequently, the named defendants, all police officers and officials, did not cause the constitutional injury McKinley alleges.

We address first McKinley's argument that Defendants violated his Fifth Amendment rights; second, his argument that Defendants, although they are police officers, may nonetheless be held liable under § 1983 for violating his Fifth Amendment rights; and, finally, his assertion that those rights were clearly established at the time they were infringed.

1.

With respect to the substance of McKinley's claim that Defendants "compelled [him] in [a] criminal case to be a witness against himself," U.S. CONST. amend. V., we note again that McKinley objects only to the use at trial of the statements he made during the second interview. This position reflects an accurate understanding of *Garrity*, which would permit the use - in a false statement, perjury, or obstruction trial - of the statements he made during the *first* interview since it was conducted pursuant to the "matter under investigation", i.e., scannergate. *See United States v. Veal*, 153 F.3d 1233, 1242-43 (11th Cir. 1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1035 (1999) (holding that a *Garrity* immunized statement could serve as evidence in a prosecution for falsification and obstruction). Focusing his challenge only on the second interview, McKinley alleges that Fortney at that point viewed him as having committed the crimes of falsification and obstruction by lying during the first interview. Consequently, McKinley asserts, Fortney and Goldsmith violated the rule of *Garrity* because *Garrity* extends as far as "the matter being investigated," *Veal*, 153 F.3d at 1243, and "the matter" now included a separate investigation of McKinley. In any event, McKinley posits, Fortney's conduct violated the Fifth Amendment because, having openly accused McKinley of committing certain crimes (falsification and obstruction), Fortney then compelled McKinley to inculpate himself in the commission of those crimes (by threatening McKinley with termination if he did not admit his role in scannergate and thus materially contradict his earlier statements). And, finally, the fruits of

the compulsory interview were introduced against McKinley at a trial for those crimes.[13]

There is evidence in the record sufficient to present genuine issues of material fact as to whether Fortney conducted the second interview of McKinley because he suspected that McKinley had committed falsification and obstruction during the first one and as to whether, during the second interview, Fortney and Goldsmith compelled McKinley to incriminate himself insofar as the crimes of falsification and obstruction are concerned. As a starting point, during the 10-15 minute pre-interview before the second interview, Fortney accused McKinley of lying during his first interview and advised him that he now had the chance to come clean and tell the truth. J.A. at 182-85 (Fortney Depo);[14] Fortney and Goldsmith then elicited, without the tape

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[13] McKinley also argues that Fortney's failure to read him the *Miranda* warnings at the outset of the second interview is actionable under § 1983. On the contrary, a § 1983 action on that basis is squarely foreclosed by the Supreme Court's decision two terms ago in *Chavez*. *Chavez*, 538 U.S. at 772 ("Accordingly, Chavez's failure to read *Miranda* warnings to Martinez did not violate Martinez's constitutional rights and cannot be grounds for a § 1983 action.") (plurality opinion).

[14] In his deposition testimony, Fortney explained:

> We had compared Patrolman McKinley's statement to, you know, other statements we had received and there was, it was obvious to us that there were differences and we felt by the number of people giving differences that he was being untruthful so we explained to him that we're gonna give him another chance to give us a statement and come clean and tell us the truth this time . . . I just told him that it was obvious, you know, to us that he was lying and we were

recorder running, an account from McKinley that satisfied them. *Id.* Second, Fortney admits that he advised McKinley that he was still under the protection of *Garrity*, so that although McKinley was required to answer the officers' questions, his statements could not be used against him in a criminal proceeding. *Id.* at 185. Third, McKinley deduced from Fortney's representation regarding *Garrity* that, just as with the first interview, he would have been disciplined and likely terminated if he did not agree to answer questions at the second interview. While Fortney could not recall whether he instructed McKinley to sign the immunity documents provided during the second interview, *see id.* at 185-86 (Fortney Depo. at 12-13), we conclude that Fortney's representation to McKinley that he "needs to tell the truth and he's still under *Garrity*,"[15] *id.* at 185, is sufficient to defeat summary

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> going to give him another chance, you know, to, even if we had to we could parade about six officers in that could tell different stories than he was telling. He needs to tell the truth and he's still under *Garrity*, he needs to tell the truth and take his chances.

J.A. at 184-85 (Fortney Depo.).

[15] Fortney's interpretation of this *Garrity* warning, according to his deposition testimony, was "[t]hat McKinley had to answer our questions truthfully and that if he said things that incriminated himself against the - the case we're investigating, you know, i.e., Scanner Gate, that those could not be used against him." J.A. at 185 (Fortney Depo.). This may suggest that Fortney in fact viewed the second interview as no more than an additional chapter in the scannergate inquiry. But by no means does Fortney's *post hoc* self-interested statement counteract the evidence in support of McKinley's allegation that in the second interview, he was under investigation for lying. Which representation of the facts - Fortney's or McKinley's - is correct is a question committed to the jury.

judgment on the issue of whether McKinley's presence at the interview was compulsory. Moreover, Defendants do not suggest that McKinley's participation in the second interview was voluntary, instead admitting in their brief that his second interview was also "*Garrity*-immunized." *See* Brief of Appellees at 35. Finally, our conclusion on this point is only strengthened by the conditions of the first interview, in which McKinley was informed that failure to answer truthfully "could result in disciplinary action" and "possible job forfeiture." *Id.* at 161-62 (immunity documents).

A fourth relevant fact is that at the beginning of the second interview, when Fortney first began recording the conversation, Goldsmith read a statement into the microphone that included another accusation of lying, to wit:

> We've called Jeff McKinley back out to be re-interviewed. He has been advised the he's still under *Garrity*. He was asked if he wanted a rep. present. He stated that he did and Dan Martincin came to the Special Investigative Unit and sat on the pre-interview.[16] We are preparing now to re-interview Jeff

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[16] Officer Martincin's presence is relevant on the issue whether Fortney and Goldsmith compelled McKinley to incriminate himself. The record discloses that (1) Martincin is not an attorney; and (2) although he was present and could be consulted, he apparently could not terminate the interview. Moreover, at no point have Defendants suggested that McKinley could have refused to answer questions without sanction. As our discussion indicates, the totality of the evidence surrounding the two interviews indicates that there are genuine issues of material fact regarding whether Fortney and Goldsmith suspected McKinley of falsification and obstruction and compelled him to give incriminating answers to their questions at the second interview.

> McKinley and we'll go over the statement form that he gave to the investigating officers on 2/25/00. It's been determined prior to this interview that [McKinley] was not truthful at the time he gave the interview on 2/25/00. He will be asked, again, the same questions and will give his responses.

Id. at 84. Fifth, during the course of the interview, Fortney and Goldsmith at least occasionally stopped the tape, pointed out inconsistencies between what McKinley was currently saying and what he had said in the unrecorded pre-interview, accused McKinley of lying, and encouraged him to tell the truth. *See id.* at 192-203 (Fortney Depo.). At this stage, McKinley asserts that the message Fortney and Goldsmith sent to him was that the "truth" was what he had said during the pre-interview; Fortney and Goldsmith, McKinley submits, were not satisfied until all of his answers matched the answers he gave in the unrecorded pre-interview.[17] Fortney does not dispute that the officers recorded over what they concluded were McKinley's untruthful answers with the answers he gave after they "encouraged him to tell the truth."[18] J.A. at 201.

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[17] McKinley does not challenge this "selective recording" as such, but appears to assert that it constitutes evidence of Fortney and Goldsmith's coercive tactics. We express no view on whether these tactics might be independently attacked as infringing on McKinley's Fourteenth Amendment due process rights. We do agree, however, that the method of questioning in this case is probative of coercion and is therefore relevant to McKinley's Fifth Amendment claim.

[18] The following exchange between McKinley's counsel and Fortney bears this out:

> Q: But for the most part you felt that his answers in the [unrecorded] pre-interview were accurate compared

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with the statements of the other officers?

A: Yes, sir.

Q: So you thought those where the truthful answers?

A: Yes, sir.

Q: And . . . those answers that you determined were truthful in the pre-interview, those contradicted some of the answers he had given you in the first statement [from the first interview], correct?

A: Yes, sir.

Q: Okay. And so as you're going along and he answers questions on the tape that are different from the ones you had determined to be the truth in the pre-interview, you turned the tape off, reminded him of what was said in the pre-interview and erased his previous answer and gave him a chance to answer what you thought were the truthful answers based on the pre-interview, correct?

A: Yes. . . .

Q: Okay. And so you were encouraging him to re-think that answer and give you a different one, right?

A: We were just encouraging him to tell the truth.

Q: But you had already determined that the truth was the answers he gave you previously in the pre-interview, right?

A: Mostly, yes.

Q: Okay. And so you were encouraging him to go back to that version to match what he had said in the pre-interview, right?

A: I can just say we encouraged him to tell the truth and, yes, we did believe that the pre-interview was mostly truthful.

Q: Okay. And that's the part of it you wanted him to say on tape.

A: Yes.

J.A. at 199-201 (Fortney Depo.).

Finally, in affidavits submitted to the district court, both Defendant Fortney and Defendant Messer - who was the Captain in charge of the scannergate investigation - made attestations that could support a finding that, prior to the second interview, they suspected McKinley of committing falsification and obstruction.[19]

Together, these facts suffice to establish a genuine issue of material fact as to whether Fortney decided to conduct a second interview of McKinley not merely to glean further information regarding scannergate but also because he suspected that McKinley had lied in the first interview and had thereby committed falsification and obstruction. In addition, these facts present a genuine issue of material fact regarding whether Fortney and Goldsmith compelled McKinley to make incriminating statements as to the crimes of falsification and obstruction.

These issues are material because if McKinley was a target and not a mere *Garrity* witness, the Fifth Amendment would preclude use, at the falsification and obstruction trial, of any incriminating statements he was compelled to make in the second interview. This conclusion follows from *Garrity* and from conventional Fifth Amendment principles. As McKinley correctly points out, *Garrity* extends as far as "the

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[19] *See* J.A. at 243 (Fortney Aff.) ("The information obtained from Officers McKinley, Foster, and Nirode, and Mr. Noble during this investigation established that Officer McKinley had lied during his February 25, 2000 statement to Lt. Goldsmith and me and had committed the crimes of falsification and obstructing official business."); *id.* at 66 (Messer Aff.) ("After I had received additional information in the course of the investigation, Lt. Fortney took a second statement from McKinley on March 7, 2000.").

matter being investigated." *Veal*, 153 F.3d at 1243. Consequently, where "the matter" includes a subsidiary investigation into the truth of an officer's statements, a decision by internal affairs investigators to compel the officer to make statements and admissions to the effect that he lied - which statements and admissions are then used to convict him of lying in a prior interview - amounts to a direct violation of *Garrity*. This is not a novel or ingenious interpretation of *Garrity* but rather the only way to read the opinion if we are to give meaningful effect to the Fifth Amendment.

Like the district court, we find the Eleventh Circuit's decision in *United States v. Veal* to be instructive on this question. In *Veal*, Miami police officers under investigation by the police department and the FBI for murdering a suspect and covering it up were prosecuted for the crime of making false statements during interviews conducted pursuant to the departmental investigation. 153 F.3d at 1237-39. The Eleventh Circuit rejected the officers' contention that *Garrity* prohibited use of their statements at the trial for these collateral crimes. *Id.* at 1243-44. Significantly, in *Veal* the government built its false statement and obstruction case not by reliance on subsequent interviews of the officers but on the basis of physical evidence and experts' analyses of the crime scene; this evidence tended to incriminate the officers and expose their cover-up. *See id.* at 1237-38. Indeed, the investigators in *Veal* did not conduct later interviews of the officers in which they accused the officers of lying during prior interviews. Consequently, the officers in *Veal* did not - and *could* not - present the Fifth Amendment claim that McKinley asserts here. Rather, the officers in *Veal* submitted that "statements protected by *Garrity* are forever barred from use in any prosecution, including one for perjury, false statements, or obstruction of justice." *Id.* at 1240. By contrast, McKinley *concedes* that his answers in the *first*

interview are admissible against him in a prosecution for falsification and obstruction of justice.

The other cases the district court relied upon to deny McKinley's claim are similarly distinguishable; the defendants in those cases did not suggest that the police or their employers compelled them to incriminate themselves in subsequent interviews as to the crimes of perjury, making false statements, or obstruction of justice. *See United States ex rel. Annunziato v. Deegan*, 440 F.2d 304, 306 (2d Cir. 1974) ("[A]ppellant was not prosecuted for past criminal activity based on what he was forced to reveal about himself; he was prosecuted for the commission of a crime while testifying, i.e. perjury."); *United States v. Devitt*, 499 F.2d 135, 142 (7th Cir. 1974), *cert. denied*, 421 U.S. 975, 95 S. Ct. 1974, 44 L. Ed. 2d 466 (1975) (observing same). Where such a claim is colorable, as it is here, the Fifth Amendment is surely implicated. In *Garrity*, the Supreme Court reasoned that questioning a public employee under threat of termination may not lead to the use of the employee's statements at trial. *See* 385 U.S. at 497-98 ("The choice given petitioners was either to forfeit their jobs or to incriminate themselves . . . We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained under our prior decisions."). But the Court has not limited this Fifth Amendment principle to cases where the state threatens job loss; the rationale of *Garrity* applies with equal force where the state exacts answers from its contractors under threat of terminating their contracts, *see Lefkowitz v. Turley*, 414 U.S. 70, 78-81, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973), and where a state "impose[s] substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." *Lefkowitz v. Cunningham*, 431 U.S. 801, 805, 97 S. Ct. 2132, 53 L. Ed. 2d 1 (1977) (holding that New York could

not strip a state Democratic party official of his office on the grounds that he refused to waive his Fifth Amendment privilege against self-incrimination before a grand jury).

Consistent with these precedents, we conclude that McKinley alleges a classic violation of the Fifth Amendment: a decision by internal affairs officers to compel an officer suspected of specific crimes to incriminate himself as to *those* crimes, followed by the subsequent use of the incriminating statements in a trial for *those* crimes. It makes no difference that the crimes at issue in this case are falsification and obstruction, rather than assault or robbery. It similarly makes no difference, as the Supreme Court's cases make clear, that the manner of compulsion was the threat of disciplinary action and termination of employment, rather than physical coercion. Indeed, if McKinley reasonably believed that Defendants would impose substantial penalties on him - such as job loss or disciplinary sanctions[20] - if he refused to answer the

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[20] In addressing this question, the D.C. Circuit held that an officer claiming the protection of *Garrity* "must have in fact believed [his] statements to be compelled on threat of loss of job and this belief must have been objectively reasonable." *United States v. Friedrick*, 268 U.S. App. D.C. 386, 842 F.2d 382, 395 (D.C. Cir. 1988). The Eleventh Circuit has reasoned similarly. *See United States v. Vangates*, 287 F.3d 1315, 1321-22 (11th Cir. 2002) (adopting *Friedrick*'s approach). We decline to require proof that McKinley reasonably believed he would be fired. It is sufficient, we think, for a jury to conclude that he reasonably believed that substantial penalties were likely to result from his refusal to answer questions during the second interview; although job termination is surely a "substantial penalty," so, too, are other employer actions, such as ordering a demotion or suspension. *See Dwan v. City of Boston*, 329 F.3d 275, 279 (1st Cir. 2003)(observing that to prove his incriminating statements were compelled, an employee must show that he was "threatened or

questions put to him in the second interview, he was compelled to incriminate himself in violation of the Fifth Amendment. *Lefkowitz v. Cunningham*, 431 U.S. at 805-806. On the facts before us, we cannot conclude as a matter of law that McKinley's belief that he would face severe sanctions for declining to incriminate himself was unreasonable.

Finally, we have made clear our view that if Fortney or any other defendants suspected McKinley of falsification and obstruction - a factual question which must be submitted to a jury - the second interview cannot be viewed as simply part of scannergate. In other words, there is a genuine question as to whether the "matter under investigation" was no longer limited to the misuse of scanners, but had broadened to include an investigation of McKinley for crimes committed by lying during the scannergate inquiry. In sum, because McKinley's incriminating statements were used at his trial for falsification and obstruction, all that is required of McKinley at the summary judgment stage is that he present sufficient evidence to create genuine issues of material fact on the questions whether any of the defendants suspected him of committing falsification and obstruction and whether any of the defendants compelled him to incriminate himself as to those crimes. At least as to Defendant Fortney - the only named defendant who participated in the second interview -

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forewarned of [a] sanction for refusing to testify"). Relevant to the question whether McKinley reasonably believed he faced a threat of substantial penalties are the totality of the circumstances surrounding the second interview and the circumstances of the first interview, to the extent they are probative of McKinley's state of mind, and whether that state of mind was reasonable, during the second. *See* discussion *supra*.

we hold that McKinley presents sufficient evidence to survive summary judgment on these questions.[21]

2.

Next we must consider the district court's conclusion that McKinley's § 1983 action cannot lie against Defendants, who are police officers, because "the only rep resentative of the State who 'used' [McKinley's] statements against him in court was the Special Prosecutor." J.A. at 275 (Dist. Ct. Op.). We reject this interpretation of the Fifth Amendment for several reasons.

First, despite its superficial appeal, the district court's bright line rule lacks support in the case law. We are not aware of any reported decision in which a federal court dismissed a § 1983 action based on an alleged Fifth Amendment violation solely on the grounds that the defendants were police officers and thus did not "use" the plaintiff's statements at trial.[22] Instead, the cases involve suits against the police and center on whether the requisite "use" at a criminal proceeding occurred. The cases do not question that the police may be held liable under § 1983 for violating someone's Fifth Amendment rights. *See Chavez*, 538 U.S. at 767; *Burrell v. Virginia*, 395 F.3d 508, 513-15 (4th Cir. 2005); *Renda v. King*, 347 F.3d 550, 557-59 (3d Cir. 2003);

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[21] We consider McKinley's Fifth Amendment claim as against the other individual defendants and the City *infra* at Part I.D of this opinion.

[22] Nor was the district court apparently aware of such precedents; the court offered no authority for its conclusion that because only prosecutors "use" statements at trial, police officers cannot face liability. *See* J.A. at 273 (Dist. Ct. Op.).

Lingler v. Fechko, 312 F.3d 237, 239 (6th Cir. 2002); *Deshawn E. v. Safir*, 156 F.3d 340, 346-47 (2d Cir. 1998); *Riley v. Dorton*, 115 F.3d 1159, 1164-65 (4th Cir.) (*en banc*), *cert. denied*, 522 U.S. 1030, 118 S. Ct. 631, 139 L. Ed. 2d 611 (1997); *Giuffre v. Bissell*, 31 F.3d 1241, 1255-56 (3d. Cir. 1994); *Weaver v. Brenner*, 40 F.3d 527, 534-36 (2d Cir. 1994) (all involving § 1983 suits against police officers).[23]

The absence of a *per se* rule barring suits against the police for Fifth Amendment violations is not surprising; the Supreme Court has implicitly acknowledged the propriety of holding police officers liable for Fifth Amendment violations:

> The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. *Although conduct by law*

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[23] The Supreme Court's holding in *Chavez*, that use of a coerced statement in judicial proceedings against the plaintiff is a prerequisite to § 1983 liability, does not resolve the question of who the proper bearer of such liability would be. Indeed, no member of the Court questioned the propriety of *who* the plaintiff sued in that case (the police officer) so much as disapprove of *what* the plaintiff sued *about* (the coercion itself, without use in a judicial proceeding). *See Chavez*, 538 U.S. at 768-71. We note that a district court in California recently observed, in *dicta*, that victims of coercive police questioning may not sue the questioning police officers under § 1983 *even if* their involuntary statements are used at trial because it is the prosecutor who introduces the statements and the judge who admits them into evidence. *Crowe v. County of San Diego*, 303 F. Supp. 2d 1050, 1091-92 (S.D. Ca. 2004). As is clear from our discussion, we find this reasoning unpersuasive. In *Crowe*, the court's holding was that the plaintiffs' action was barred under *Chavez* because their statements were used only at a grand jury proceeding and at a hearing to determine whether they would be tried as adults or juveniles. *See id.* at 1088-90.

> *enforcement officials prior to trial may ultimately impair that right*, a constitutional violation occurs only at trial.

United States v. Verdugo-Urquidez, 494 U.S. 259, 264, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) (emphasis added); *see also Chavez*, 538 U.S. at 767 (quoting the same passage). It is hard to see how law enforcement officials could "ultimately impair" the right against self-incrimination if not by compelling a suspect to make incriminating statements that are later used against him at trial. It is equally hard to see how officials whose conduct ultimately impaired a citizen's Fifth Amendment rights could nonetheless escape civil liability merely because a different state official put the statements into evidence at trial. This is especially true since prosecutors are absolutely immune from suit when the conduct complained of relates to their role as advocates for the state in the judicial process. *E.g.*, *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993); *Burns v. Reed*, 500 U.S. 478, 485-86, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991); *Higgason v. Stephens*, 288 F.3d 868, 877-78 (6th Cir. 2002). Such immunity exists even when it is alleged that a prosecutor knowingly presented false evidence against the plaintiff at trial. *Buckley*, 509 U.S. at 272-73; *see also Imbler v. Pachtman*, 424 U.S. 409, 429-31, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976); *Spurlock v. Thompson*, 330 F.3d 791 (6th Cir. 2003). It follows that a rule barring suits against the police for Fifth Amendment violations is a rule barring *any* suits for Fifth Amendment violations. But it cannot be that invasions of the right against compelled self-incrimination are not actionable. The Fifth Amendment's protection against self-incrimination, like the Fourth Amendment's protection against unreasonable searches and seizures, is explicit and personal. Just as people may file suit under § 1983 to redress

deprivations of the latter protection, so may they sue to redress deprivations of the former.

One might think *Chavez* precludes our conclusion because it makes clear that the right against compelled self-incrimination is not violated until incriminating statements are used in a criminal proceeding. But this interpretation of *Chavez* is untenable, not least because it was obvious in *Chavez* that no criminal proceeding had occurred. We read the Fifth Amendment's requirement that a plaintiff's statements be used in a criminal proceeding as essentially one of standing. Where such use of the statements has not occurred, the plaintiff may not sue because he has not suffered the injury against which the Fifth Amendment protects. Where such use has occurred, however, there is no reason to preclude the plaintiff from suing the state officials who actually compelled him to incriminate himself in a clearly unconstitutional and objectively unreasonable way. This is not to say that the plaintiff is relieved of having to show causation. Returning our attention to the case before us, we conclude that for purposes of surviving Defendants' motion for summary judgment, McKinley has done so.

"[A] public official is liable under § 1983 only if he causes the plaintiff to be subjected to a deprivation of his constitutional rights." *Baker v. McCollan*, 443 U.S. 137, 142, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979) (internal quotation marks and citation omitted). Causation in the constitutional sense is no different from causation in the common law sense. Indeed, "[s]ection [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). Thus the Supreme Court rejected the

proposition that a police officer who applied for a warrant without probable cause could escape liability for the ensuing arrest merely because the warrant was supplied by a judge. *Malley v. Briggs*, 475 U.S. 335, 345 n.7, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). In *Malley*, the defendant police officer argued that "the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest." *Id.* The Court said that the officer's "'no causation' rationale in this case is inconsistent with our interpretation of § 1983 . . . Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link." *Id.* The same reasoning applies to the present case. Officer Fortney, it is alleged, compelled McKinley to incriminate himself. Fortney took these actions pursuant to an ongoing official investigation. A special prosecutor was appointed. Fortney turned the statements over to the prosecutor and when the prosecutor introduced the statements at McKinley's trial, he did so through Fortney, who was on the witness stand. Viewing the facts in the light most favorable to McKinley, we hold that the alleged deprivation of his constitutional rights - i.e., the use at trial of incriminating statements he was compelled to make

- was a "natural consequence of [Fortney's] actions."[24] *Pape*, 365 U.S. at 187.

Our conclusion that Fortney may be held liable does not mean that causation will be easy to prove in every case. A police officer may defend on the grounds that he attempted to prevent the use of the allegedly incriminating statements at trial, or that he never turned the statements over to the prosecutor in the first place. Such a defense would be of no avail to Fortney, who turned McKinley's statements over to the prosecutor, took the stand at McKinley's trial, and testified about McKinley's having made the statements. But the availability of such a defense insures that liability will befall only those state actors whose conduct caused the constitutional injury at hand.

With these principles in mind, we reject the district court's position that the police may never be liable for violating someone's Fifth Amendment rights. We hold instead

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[24] The dissent asserts that Fortney cannot be held liable because his actions comported with *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967). This misses the point of *Garrity* and of McKinley's claim in this case. To comport with *Garrity*, a state employer who compels an employee to make incriminating statements must not only promise not to use those statements in a criminal proceeding against the employee, but must also *keep* that promise. McKinley's claim is that Fortney and his colleagues *broke* that promise by compelling him to incriminate himself under the false promise of *Garrity* immunity and by turning the incriminating statements over to the prosecutor, who then prosecuted McKinley for the very crimes about which McKinley was compelled to make incriminating statements. As we have discussed, McKinley has offered enough evidence of this claim to proceed to trial.

that in actions brought under § 1983 for alleged violations of those rights, "it is the person who wrongfully coerces or otherwise induces the involuntary statement who causes the violation of the [Fifth Amendment] privilege. In other words, while there may be no cause of action for the wrongful procurement of *unused* incriminatory statements . . . *it is the wrongful procurement* . . . that forms the basis for liability." *Williams v. Fedor*, 69 F. Supp. 2d 649, 676 (M.D. Pa. 1999), *aff'd without opinion*, 211 F.3d 1263 (3d Cir. 2000).

3.

We now turn to whether the right McKinley asserts in this action - the right not to be compelled by his superiors, who are state officials, to make incriminating statements that are later used against him at trial - was clearly established at the time of McKinley's second interview. We hold that it was.

We are mindful that determining whether a right is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). This is precisely what we have done. We have stressed that the facts - viewed in the light most favorable to McKinley - present a straightforward case of forced self-incrimination: Internal affairs investigators suspect that a police officer lied when asked, during an interview conducted as part of an official investigation, about his knowledge of or participation in alleged police misconduct. The investigators are aware that lying under such circumstances is a crime. The investigators order the officer to appear for a second interview and compel him to admit, both expressly and by implication, that he did indeed lie in the initial interview. Finally, the state uses these statements against the officer in a criminal trial for lying during the

initial interview, i.e., for falsification and obstructing the internal affairs investigation.

On these facts, the contours of the Fifth Amendment's right to be free from forced self-incrimination are "sufficiently clear that a reasonable official would understand that what [the investigators did] violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *see also Saucier*, 533 U.S. at 202 ("The relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."). We decline to adopt the view of qualified immunity advanced by Defendants and the district court, namely, that since "there is no federal case on point," J.A. at 278 (Dist. Ct. Op.), Defendants are immune from suit. The Supreme Court's response to this argument is well-suited to the circumstances of this case: "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)). In cases where courts have dismissed Fifth Amendment suits against state employers on qualified immunity grounds, they have done so because the complaining employees did not allege that they had been subjected to the kind of compulsion and subsequent prosecution proscribed by *Garrity* and its progeny. *See Chan v. Wodnicki*, 123 F.3d 1005, 1008-10 (7th Cir. 1997), *cert. denied*, 522 U.S. 1117, 118 S. Ct. 1054, 140 L. Ed. 2d 117 (1998) (holding that a police department's after-the-fact transfer of an officer who invoked his Fifth Amendment privilege before a grand jury did not amount to the type of compulsion that is prohibited under *Garrity* and similar cases); *Singer v. State of Maine*, 49 F.3d 837, 845-47 (1st

Cir. 1995) (holding that a state tax bureau's after-the-fact dismissal of an employee who refused to answer possibly incriminating questions was not a violation of a clearly established right because the employee was not threatened with sanctions prior to questioning nor required to waive her Fifth Amendment privilege); *Wiley v. Doory*, 14 F.3d 993, 996 (4th Cir. 1994), *cert. denied*, *Wiley v. Mayor and City Council of Baltimore*, 516 U.S. 824, 116 S. Ct. 89, 133 L. Ed. 2d 45 (1995) ("Although it is alleged that the officers made statements under the threat of job loss, these statements were not used against them in any criminal proceeding.").

In stark contrast to these cases, McKinley presents sufficient evidence for summary judgment purposes to suggest that he *was* compelled to incriminate himself in precisely the manner held unlawful by the Supreme Court in *Garrity*. The Court's holding in that case bears repeating: "We now hold that the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." *Garrity*, 385 U.S. at 500. Particularly in light of the defendants' obvious familiarity with *Garrity*,[25] we take issue with the district court's representation that "there is no federal case on point" because it is hard to imagine a case that could be more on point - in view of the facts before us - than

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[25] Recall that Fortney repeatedly discussed the rule of *Garrity* in his deposition; he and Goldsmith explicitly told McKinley that *Garrity* applied in the second interview; and, finally, the immunity documents supplied in the first interview were clearly inspired by *Garrity* and its rationale.

Garrity itself. We conclude, therefore, that Defendant Fortney is not entitled to qualified immunity.[26]

Finally, we address the criticisms of our dissenting colleague. The dissent suggests that Officer Fortney should be entitled to qualified immunity because we have established a "new right of action." We are unclear how, but it makes no difference since in no sense is McKinley's right to sue Fortney "new." The dissent cannot mean that the use at a criminal proceeding requirement is new. In *Chavez*, the Court was asked whether the Fifth Amendment right against self-incrimination was truly as broad as the Ninth Circuit had interpreted it, which is to say, as a right not only against the use of one's self-incriminating statements in a criminal case but a right against being coercively questioned in the first instance. *See Chavez*, 538 U.S. at 765-68. *Chavez* established a new rule of law only in the sense that it *limited* the right to sue for Fifth Amendment violations to *only* those cases in which such suits were *already* permissible under clearly established law, i.e., cases in which the plaintiff's incriminating statements had been used in a prior criminal proceeding.

If the dissent means that our holding is "new" because we have sustained, at the summary judgment stage, a § 1983 action against a police officer on the allegation that he

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[26] The issue whether the other individual defendants are entitled to qualified immunity is not before us because McKinley has not yet had an adequate opportunity to conduct discovery as to those defendants. *See* discussion *infra* Part I.D. If on remand McKinley discovers and produces sufficient evidence that other individual defendants violated his right not to be compelled to incriminate himself, it will be the task of the district court to determine whether those defendants are entitled to qualified immunity.

compelled the plaintiff to incriminate himself, we can only conclude the dissent misapprehends the nature of qualified immunity. The doctrine of qualified immunity does not mean that a state actor is qualifiedly immune unless the plaintiff can point to a prior case in which judgment was entered against the same type of state actor on the same facts.[27] As we said recently: "[O]fficials do not enjoy qualified immunity simply because the exact action in question has not previously been held unlawful by a court, but 'in light of pre-existing law the unlawfulness must be apparent.'" *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 901 (6th Cir. 2004) (quoting *Anderson*, 483 U.S. at 640). And as the Supreme Court said three terms ago: "Officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). With regard to the present case, pre-existing law makes apparent the unlawfulness of compelling someone to make incriminating statements that are later used against him at trial. Furthermore, as we discuss *supra* at Part I.C.2 of this opinion, there is no holding to the effect that Fifth

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[27] As it happens, there *is* a case where judgment was entered against a police officer in a § 1983 action for violating someone's Fifth Amendment right against self-incrimination. *See Griffin v. Strong*, 983 F.3d 1540 (10th Cir. 1993). The plaintiff was tried and the incriminating statements he was compelled to make were used at trial. *Id.* at 1541. After the convictions were overturned, the plaintiff sued the police officer who compelled him to make the statements. The Tenth Circuit held, as a matter of law, that the officer had compelled the plaintiff to make the statements, reversed the district court's holding to the contrary and instructed the court to enter judgment in favor of the plaintiff. *Id.* at 1544; *Griffin v. Strong*, 827 F. Supp. 683, 685 (D. Utah 1993) (decision on remand).

Amendment violations are not actionable under § 1983. On the contrary, there are holdings to the effect that where the requisite use at a criminal proceeding occurs, a right of action against the police may be had. *See, e.g., Weaver v. Brenner*, 40 F.3d 527, 534-35 (2d Cir. 1994); *Deshawn E. v. Safir*, 156 F.3d 340, 345-47 (2d Cir. 1998); *Giuffre v. Bissell*, 31 F.3d 1241, 1255-56 (3d Cir. 1994); *see also Griffin v. Strong*, 983 F.2d 1540, 1543-44 (10th Cir. 1993).

Accordingly, we hold that a reasonable officer would understand that what Fortney and his colleagues are alleged to have done violates the Fifth Amendment right against self-incrimination. *Anderson*, 483 U.S. at 640.

D.

Although we hold that police officers may face liability under § 1983 for violating suspects' Fifth Amendment rights and that McKinley has presented sufficient evidence on this score as to Defendant Fortney, it remains to determine whether any of the other officers named as defendants in this case, or the City of Mansfield, are entitled to summary judgment.

As is clear from our discussion *supra*, the evidence upon which McKinley relies centers exclusively on the second interview conducted by Defendant Fortney and his colleague, Lt. Goldsmith, who is not a defendant herein. As to the other individual defendants, all of whom are superiors to Fortney, McKinley merely hypothesizes liability for these officials, on the apparent theory that they must have participated in the alleged Fifth Amendment violation since they are "up the chain of command." *See* Brief of Appellant at 47-48 ("Fortney and anyone else up the chain of command who knew that the second interview was to take place and that

[McKinley] was suspected of lying in the first interview, had an obligation to offer [McKinley] the protections of the Fifth Amendment."). State officials are liable under § 1983 only if their conduct "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution." 42 U.S.C. § 1983. Because McKinley does not support this hypothesis with record evidence tending to show that such higher-ups knew of the second interview or shared Fortney's alleged suspicion that McKinley lied in the first interview, we would ordinarily affirm the dismissal of his claims as against the other officer-defendants and the City. However, McKinley submits that the reason he can offer no evidence implicating the other individual defendants and the City in the alleged violation of his Fifth Amendment rights is that the district court granted summary judgment before affording him a sufficient opportunity to conduct discovery. *See Vance v. United States*, 90 F.3d 1145, 1148 (6th Cir. 1996) (citation omitted) (holding that summary judgment is improper under such circumstances). We agree.

Defendants moved for summary judgment before any discovery occurred. McKinley responded with a motion seeking leave to conduct discovery and to hold in abeyance a decision on Defendants' motion for summary judgment until he conducted discovery and responded to Defendants' motion. In his motion, McKinley specifically requested that he have an opportunity to "view the investigative file created and kept by the Mansfield Police during their internal 'scannergate' investigation" and to "depose the named defendants and possibly others whose names may appear in the investigative file." J.A. at 125-26. The court's response was to permit McKinley only to "depose Defendant Officer Dale Fortney on whether he selectively recorded McKinley's statements in the second interview." *Id.* at 129 (Dist. Ct. Ord.).

By his motion for leave to conduct discovery, McKinley clearly fulfilled his "obligation to inform the district court of [his] need for discovery" prior to a decision on the summary judgment motion. *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 627 (6th Cir. 2002). Moreover, we note, McKinley objected to the court's limited discovery order in his motion in response to Defendants' motion for summary judgment and again requested additional discovery. *See* J.A. at 133. He makes the same argument in his brief to this Court. *See* Brief of Appellant at 49. Consequently, McKinley has preserved for appeal his claim that summary judgment was premature due to an inadequate opportunity to discover evidence regarding all of the defendants. *See Abercrombie*, 280 F.3d at 627 (citing *Vance*, 90 F.3d at 1149).[28] We review such claims for abuse of discretion, *see id.*, and conclude that in this case, the district court abused its discretion because at the time of its highly restrictive discovery order, *no* discovery had occurred and the court offered no explanation for limiting discovery to only a deposition of Fortney, and regarding only his tactics during the second interview. *Compare Abercrombie*, *supra*, at 628 (upholding, in a case where substantial discovery had already occurred, a stay of discovery where the record showed that the specific additional material sought would be duplicative and the district court explained as much in its order).

Accordingly, we hold that on remand the district court must grant McKinley a reasonable opportunity to conduct

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[28] McKinley is not precluded from raising this claim merely because he cited only the summary judgment order in his Notice of Appeal. *See Abercrombie*, 280 F.3d at 627 n.3 ("That Abercrombie appealed only from the grant of summary judgment and not the order staying discovery is . . . of no moment. A stay of discovery is not a final appealable order.").

further discovery. At a minimum, he should be entitled to any documents that are relevant to the constitutional injury he alleges and to depose the named defendants and anyone else reasonably likely to offer relevant information regarding the decision to interview McKinley a second time. We express no view on whether such further discovery will be fruitful for McKinley's case. At this early stage, it suffices for us to conclude that the district court erroneously limited McKinley's ability to discover evidence implicating Fortney's superiors and the City in the alleged Fifth Amendment violation in a case where he has presented sufficient evidence to withstand summary judgment regarding Fortney's liability for the alleged violation.

II. Malicious Prosecution

We now address whether - despite evidence that at least Defendant Fortney may have violated McKinley's Fifth Amendment rights - the district court nonetheless properly dismissed McKinley's claim that Defendants maliciously prosecuted him. In evaluating McKinley's malicious prosecution claim, the district court first noted that prosecutors alone make the decision to prosecute and, furthermore, they are absolutely immune from civil liability for their prosecutorial decisions. Second, the court cited this Court's decision in *Skousen v. Brighton High Sch.*, 305 F.3d 520 (6th Cir. 2002), for the proposition that a police officer may not be held liable for malicious prosecution when he did not make the decision to prosecute.

The court further observed that there was no evidence suggesting that any of the defendants influenced or even participated in Prosecutor Knowling's decision to bring charges. The court dismissed as "weak" McKinley's argument that the defendants should face § 1983 liability for

passing "false" evidence (the tape and transcript of the second interview) to Knowling. The court's primary basis for dismissing this argument was that even without relying on the second interview, the evidence of falsification and obstruction of official business - which consisted of the discrepancies between McKinley's first statement and the statements of Nirode, Foster, and Noble - *at least* amounted to probable cause to charge McKinley with those offenses. Finding that no constitutional violation occurred and therefore seeing no need to proceed to the issue of qualified immunity, the court concluded its analysis of the malicious prosecution claim. We, too, are convinced that because there was probable cause - independent of the fruits of the second interview - to support the prosecution of McKinley, the malicious prosecution claim must be dismissed.

As the district court correctly held, the named defendants "cannot be held liable for malicious prosecution when [they] did not make the decision to prosecute [the plaintiff]." *Skousen*, 305 F.3d at 529. McKinley presents no evidence suggesting that defendants conspired with, influenced, or even participated in, Prosecutor Knowling's decision to bring charges against him.[29] *Skousen*, in which the plaintiff alleged that a police officer had falsely accused her, clearly forecloses a malicious prosecution claim based solely on officers' turning over evidence to the prosecuting authorities. *Id.*

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[29] McKinley may not have been able to access evidence on this question due to limits the district court imposed on his ability to conduct discovery. However, because there was probable cause to prosecute, we need not determine whether the district court erred in limiting discovery as far as McKinley's malicious prosecution claim is concerned.

In any event, even if McKinley *could* implicate defendants in the decision to prosecute, there was probable cause, independent of the contested second interview, to support the decision. While the state of the law of malicious prosecution is somewhat uncertain in this circuit, *see Darrah v. City of Oak Park*, 255 F.3d 301, 308-12 (6th Cir. 2001) (discussing confusion in the wake of *Frantz v. Village of Bradford*, 245 F.3d 869 (6th Cir. 2001)),[10] it nonetheless remains firmly established that where there is probable cause to prosecute, a § 1983 action for malicious prosecution will not lie. *Darrah*, 255 F.3d at 312; *see also Albright v. Oliver*, 510 U.S. 266, 273-75, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994); *Spurlock v. Satterfield*, 167 F.3d 995, 1006 (6th Cir. 1999). Indeed, in *Darrah* we resolved the issue presented here in a straightforward manner: "If this court finds that there was probable cause to prosecute [the plaintiff], regardless of any alleged false statements made by [the investigator at the

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[10] In *Frantz*, a panel of this Court issued a puzzling opinion regarding the propriety of Fourth Amendment malicious prosecution claims. The panel interpreted the Supreme Court's plurality opinion in *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) to mean that the Fourth Amendment could not serve as the basis for a § 1983 malicious prosecution action unless the plaintiff brings before the court additional allegations of violations of his Fourth Amendment right to be free from illegal seizures. *Frantz*, 245 F.3d at 875-77. The *Darrah* panel concluded that *Frantz*, a 2001 opinion, appears to contradict a 1999 opinion of this Court, which did not question the viability of an independent malicious prosecution action brought under § 1983. *See Spurlock v. Satterfield*, 167 F.3d 995, 1006 (6th Cir. 1999). The panel in *Darrah* determined that it was bound by *Spurlock*, under the rules of this circuit, but nonetheless evaluated and dismissed the plaintiff's claim under both the *Frantz* bright line approach and the traditional probable cause framework outlined in *Spurlock*. *Darrah*, 255 F.3d at 310-12.

probable cause hearing], then she cannot make out a malicious prosecution claim under the Fourth Amendment." *Darrah*, 255 F.3d at 312. Just as we did in *Darrah*, the district court below assessed the totality of the evidence implicating McKinley in the crimes for which he was charged, while disregarding the challenged second interview.

The district court's conclusion that probable cause existed is a legal question to be reviewed by this Court *de novo*. *See, e.g., Darrah*, 255 F.3d at 312. In this case, the finding surely withstands review. At the time Knowling decided to charge McKinley with falsification and obstruction of official business - sometime after March 20, 2000, the date of the Foster statement - Knowling had at least the following unchallenged evidence at his disposal: Nirode's February 24 statement, which alleges that Foster told Nirode and McKinley about overhearing the Noble phone call on his scanner and divulged the contents of the call; McKinley's February 25 statement (the first interview), which is materially inconsistent with Nirode's statement insofar as it denies that Foster said anything about the Noble call; Noble's February 29 statement, which confirms that Noble made the cell phone call in question; and finally, Foster's March 20 statement, which is consistent with Nirode's statement fact-for-fact, and therefore materially inconsistent with McKinley's first statement. These statements easily constitute "facts and circumstances . . . sufficient in themselves to warrant a man of reasonable caution in the belief," *Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949), that McKinley committed falsification and obstruction of official business.[31]

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[31] Ohio's falsification statute provides: "No person shall knowingly make a false statement when . . . [t]he statement is made in any official proceeding . . . [or] the statement is made with

In conclusion, we hold that because there was probable cause, independent of the statements he made at the challenged second interview, to prosecute McKinley, the district court properly dismissed McKinley's malicious prosecution claim.

CONCLUSION

In sum, with respect to McKinley's claim that Defendants "compelled [him] in a criminal case to be a witness against himself," U.S. CONST. amend. V., we hold that McKinley has presented sufficient evidence to defeat summary judgment as to Defendant Fortney and that the district court prematurely granted summary judgment as to the other defendants because McKinley did not have an adequate opportunity to conduct discovery. Consequently, on this claim, we REVERSE and REMAND the case to the district court for proceedings consistent with this opinion. As to McKinley's claim that Defendants maliciously prosecuted him, we hold that probable cause supported the decision to prosecute. Accordingly, we AFFIRM the district court's entry of summary judgment on this claim. Finally, because we

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purpose to mislead a public official in performing the public official's official function." OHIO REV. CODE § 2921.13(A)(1). As for obstruction of official business:

> No person, without privilege to do so and with purpose to prevent, obstruct or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties.

Id. § 2921.31 (A).

remand in part, we instruct the district court to reinstate McKinley's state law claims.

CONCURRING IN PART, DISSENTING IN PART

BRIGHT, Circuit Judge, concurring in part and dissenting in part. I concur in affirming the district court's entry of summary judgment as to McKinley's malicious prosecution claim. I, however, would affirm the district court's entry of summary judgment as to McKinley's Fifth Amendment claim to all appellees, including Officer Fortney.

McKinley concedes, and the rule is, that no Fifth Amendment violation occurs until the wrongfully obtained statement is introduced against a defendant in a criminal proceeding. *See Chavez v. Martinez*, 538 U.S. 760, 770, 155 L. Ed. 2d 984, 123 S. Ct. 1994 (2003) ("a violation of the constitutional *right* against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case."). Therefore, if McKinley's Fifth Amendment rights were violated, the violation occurred when the prosecutor introduced the transcript of the second interview at McKinley's trial.[1]

If, as the majority now holds, Officer Fortney might be deemed a participant in the violation, he would nonetheless not be liable. Even assuming a scenario in this case that Officer Fortney knowingly collaborated with the prosecutor to introduce the evidence in question at trial, that would not

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[1] A Fifth Amendment constitutional violation is different than a violation of the Fourth Amendment, where the violation occurs at the time of the improper search or seizure. *See Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994); *Shamaeizadeh v. Cunigan*, 182 F.3d 391 (6th Cir. 1999).

save McKinley's right of action. In this case Officer Fortney did not violate McKinley's privilege against self-incrimination in the interviews because he advised McKinley that the statements would not be used against him in any criminal proceedings. The interviews were properly conducted in accordance with the rule announced in *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967).

The remaining question is whether McKinley's Fifth Amendment right should be deemed violated when Officer Fortney turned the result of the interviews over to the prosecutor who introduced the statements at McKinley's trial. To hold Officer Fortney to have violated McKinley's Fifth Amendment privilege against self-incrimination by turning over this evidence would require the assumption that Officer Fortney could foresee that the prosecutor would offer the tainted evidence at trial, that defense counsel would not object, and that the trial judge would err in admitting the evidence.

The assumptions made above would create a new right of action, not previously decided by a court and not clearly established at the time Officer Fortney turned the evidence over to the prosecutor. As such, Officer Fortney should be protected by qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

Moreover, the tainted evidence was rejected on appeal and the conviction overturned. That result could serve as a

determination that McKinley's Fifth Amendment privilege against self-incrimination was not in fact violated. *Cf. Chavez v. Martinez*, 538 U.S. 760, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003).

Accordingly, I would affirm as to Officer Fortney.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:02 CV 2339

[Filed August 27, 2003]

JEFFREY McKINLEY,	)
Plaintiff,	)
	)
v.	)
	)
CITY OF MANSFIELD, et al.,	)
Defendants.	)
	)

JUDGE DAN AARON POLSTER

MEMORANDUM OF OPINION AND ORDER

Before the Court is the Defendants' Motion for Summary Judgment (ECF No. 11), Plaintiff's Motion to Strike and for Sanctions (ECF No. 15), and Defendants' Cross Motion for Sanctions (ECF No. 18). For the reasons that follow, Plaintiff's Motion to Strike and for Sanctions (ECF No. 15) is **DENIED**, Defendants' Cross Motion for Sanctions (ECF No. 18) is **DENIED**, and Defendants' Motion for Summary Judgment (ECF No. 11) is **GRANTED**.

Because the Court's ruling on the summary judgment motion dismisses with prejudice the federal claims, the Court will exercise its discretion to **DISMISS WITHOUT PREJUDICE TO REFILING IN STATE COURT** the state law claims.

I. INTRODUCTION (Motion to Strike)

Plaintiff Jeffrey McKinley, a police officer in Mansfield, Ohio's Division of Police ("MDP"), brings this action alleging federal civil rights claims and common law tort claims against his employer, the City of Mansfield, Ohio, and certain of the City's past and present employees: Lawrence Harper, former Chief of Police, now retired; Philip Messer, former Police Captain, now Chief of Police; Ronald Kreuter, the City's Service/Safety Director; Dale Fortney, former Police Lieutenant, now retired; and Robert Konstam, former City Law Director. The case arises out of the City's administrative investigation of reports that its police officers were unlawfully using radio scanners to eavesdrop on private cell phone calls in 1999 and 2000 (euphemistically known as "the Scannergate investigation"), and the subsequent prosecution by the State of Ohio of Officer McKinley for falsification, obstruction of official business and interference with civil rights.

After the state court dismissed the civil rights charge against McKinley, a jury convicted him of falsification and obstruction of justice. These convictions were reversed by the Ohio Court of Appeals.[1] Shortly thereafter, McKinley filed the instant complaint alleging violations of his Fourth

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[1] *See State v. McKinley*, No. 01CA98, 2002 WL 1732136 (Ohio App. 5 Dist. Jun. 25, 2002).

Amendment right to be free from malicious prosecution (Count I) and his Fifth Amendment right to be free from compelled self-incrimination (Count V). McKinley also alleged the following state law claims: false arrest (Count II), malicious prosecution (Count III), abuse of process (Count IV), intentional infliction of emotional distress (Count VI) and breach of contract (Count VII).

On February 10, 2003, Defendants filed the pending summary judgment motion. *ECF No. 11.* Plaintiff responded by filing a combination motion for leave to conduct discovery/motion for order holding in abeyance a decision on the summary judgment motion. *ECF No. 12.* The Court issued an order granting plaintiff's motion to permit discovery to the extent specified therein, and set forth a discovery and briefing schedule. *ECF No. 13.* After discovery concluded, Plaintiff filed a response to the summary judgment motion. *ECF No. 14.* Plaintiff also filed the pending motion to strike and for sanctions, asking the court to strike from Defendants' summary judgment motion the transcript of an interview of McKinley on March 7, 2003 conducted by MDP officers investigating Scannergate. *ECF No. 15.* Defendants responded to Plaintiff's motion to strike by filing a cross motion for sanctions. *ECF No. 18.* Because the motion to strike deals with evidence attached to the summary judgment motion, the Court must resolve the motion to strike first.

During the course of the Scannergate investigation, McKinley was interviewed twice by MDP officers, who asked him virtually the same questions in both interviews. In the first interview, which occurred on February 25, 2000, McKinley denied any knowledge concerning his or his fellow officers' use of scanners to intercept private cordless or cell phone calls. *Defendants' Motion for Summary Judgment, Exhibit Two* (hereafter, "*Feb. 25 Tr.*"). The February 25,

2000 interview was tape-recorded, transcribed and used against him in his state court prosecution.

Prior to recording the second interview on March 7, 2000, the investigating officers informed McKinley (who accepted the investigating officers' invitation to have a union representative present and was thereafter accompanied by that union representative) that they had evidence that McKinley had lied on February 25th about his knowledge concerning Scannergate, and afforded McKinley an opportunity to provide truthful answers. During the course of recording the questions and answers, both the investigating officers and McKinley stopped the tape recorder - McKinley, to consult with union representative Martincin; the investigators, because some of McKinley's answers were either in conflict with other evidence they had obtained or did not square with admissions he allegedly made prior to taping. After these discussions, the relevant portion of the tape was rewound, and McKinley was given a second opportunity to answer the question. The end result is a tape (and transcript) in which McKinley detailed his knowledge concerning his and his fellow officers' use of scanners to intercept private cordless or cell phone calls. *Defendants' Motion for Summary Judgment, Exhibit Four* (hereafter, "*Mar. 7 Tr.*"). The answers that McKinley provided in the second interview were materially inconsistent with the answers he provided to the same questions in the first interview. The March 7th transcript was also used as evidence against him in his criminal prosecution.

In *Dawson v. City of Kent*, 682 F.Supp.920 (N.D. Ohio 1988), *aff'd*, 865 F.2d 257 (6th Cir. 1988), the district court, in addressing a motion to strike an affidavit in support of a summary judgment motion, held:

> The federal rules make only one reference to a motion to strike in Rule 12(f). This rule relates only to pleadings and is inapplicable to other filings. The court will thus not strike the affidavit but will consider it as a matter of evidence.

Id., at 922.[2] *See also Lombard v. MCI Telecommunications Corp.*, 13 F.Supp.2d 621, 625 (N.D. Ohio 1998) (citing *State Mut. Life Assur. Co. of America v. Deer Creek Park*, 612 F.2d 259, 264 (6th Cir. 1979); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992)). Because the March 7th transcript is not a pleading, there is no basis for the Court to strike it. More importantly, the March 7th transcript is one of two transcripts that form the heart of McKinley's case. All parties acknowledge, and the transcript itself reveals,[3] that the

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[2] Federal Rule of Civil Procedure 12(f) provides:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

[3] The March 7, 2000 transcript begins:

> Today's date is Tuesday, March 7th, 2000. Lt. Fortney and Lt. Goldsmith are in the office of the METRICH Drug Task Force. We're in the conference room. We've called Jeff McKinley back out to be re-interviewed. He has been advised that he's still under Garrity. He was asked if he wanted a rep. present. He stated that he did and Dan Martincin came to the Special Investigative Unit and sat on the pre-interview. We are preparing now to re-interview

March 7th interview is not a complete recording of the entire discussion occurring that day. And there is no allegation or evidence that any of the Defendants ordered McKinley to provide untruthful answers to their questions, or that any of them altered the finalized version of the interview.

Because a motion to strike cannot be used to rid the record of evidentiary support for summary judgment motions, and because Defendants never tried to conceal the fact that the second interview was selectively recorded, Plaintiff's Motion to Strike and for Sanctions (ECF No. 15) is hereby **DENIED**. Since McKinley's motion was not entirely frivolous, Defendants' Cross Motion for Sanctions (ECF No. 18) is also **DENIED**.

II. FACTS[4]

A. Arrest of William Noble on February 3, 2000

During roll call prior to Officer Jeffrey McKinley's shift on February 3, 2000, his supervisor told him and the other officers that, due to overcrowding in the jail, the officers

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> Jeff McKinley and we'll go over the statement form that he gave to the investigating officers on 2/25/2000. It's been determined prior to this interview that he was not truthful at the time he gave the interview on 2/25/20000. He will be asked, again, the same questions and will give his responses.

March 7 Tr., at 1 (emphasis added).

[4] The following facts are either undisputed or viewed in a light most favorable to the Plaintiff. *See infra*, at 13 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

should, if possible, issue a summons to the persons arrested that evening rather than incarcerate them. At approximately 2:00 a m. on February 3, 2000, while patrolling the streets of Mansfield, McKinley came upon William Noble who was intoxicated and urinating in the parking lot across the street from the Subway Lounge. While Officer McKinley was writing up the ticket, Mr. Noble returned to his car and made a cell phone call. MDP Sergeant David Nirode and MDP Officer Gary Foster arrived at the scene in separate cars. Officer Foster told McKinley and Nirode that he overheard Mr. Noble's cell phone call on his scanner. He related the substance of the call to the officers. McKinley subsequently incarcerated Mr. Noble for intoxication and public indecency. McKinley claims that he incarcerated Mr. Noble based on information provided by Sgt. Nirode that the jail was no longer overcrowded.[5] Officer Foster asserts that McKinley incarcerated Mr. Noble after Foster related Mr. Noble's comments to McKinley.[6]

B. The Scannergate Investigation

At the end of February 2000, following reports that Mansfield police officers were unlawfully using scanners to eavesdrop on private cordless and cell phone calls, Police Chief Harper directed Captain Messer to oversee the investigation of Scannergate. The investigation consisted of interviews of more than thirty Mansfield police officers, the search of police officers' lockers, and statements taken from at least four civilians. Captain Messer directed Lieutenant Fortney to order certain Mansfield police officers, including

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[5] *Mar. 7 Tr.*, at 8-9.

[6] *Defendants' Brief in Opposition to Plaintiff's Motion to Strike, etc., Declaration of Gary Foster* ¶¶ 2-4.

McKinley, to appear and answer fully and truthfully all questions put to them.

On February 24, 2000, Sgt. Nirode gave a statement to Lt. Fortney detailing Nirode's knowledge concerning the matters under investigation. The statement revealed that, earlier that month, Officer Foster informed Sgt. Nirode and Officer McKinley that he had overheard a cell phone call made by a criminal suspect, later identified as William Noble, from a parking lot across the street from the Subway Lounge in Mansfield. Officer Foster stated that he related the substance of the intercepted call to the officers, after which Mr. Noble was incarcerated.

On February 25, 2000, Lt. Fortney and MDP Lieutenant Goldsmith interviewed Officer McKinley.[7] Prior to commencing the interview, Plaintiff read and acknowledged the following in writing:

ADMINISTRATIVE PROCEEDINGS
INTERNAL AFFAIRS UNIT

> You are hereby advised that you are about to be questioned as part of an official administrative investigation of the Division of Police. You will be asked specific question (sic) which will relate directly and narrowly to the performance of your official duties or fitness as an employee or member of the Division of Police. The purpose of this interview is to assist in determining whether disciplinary action is warranted, and the answers furnished may be used in

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[7] Lt. Goldsmith is now deceased.

disciplinary proceedings that could result in administrative action against you.

Because this is an administrative and not a criminal investigation, the Division of Police will not use any of the answers or information gained from the interview in any criminal proceeding against you. Further, the Division of Police will not release this information to any other agency without your approval and will ho[l]d it as confidential, except as mandated by an appropriate and competent authority or as necessary for disciplinary proceedings and appeals of such proceedings.

You are further advised that you are hereby ordered and required to fully and truthfully answer all questions asked of you in this interview.

Your failure to comply with this order constitutes your being in violation of the Rules and Regulations of the Division of Police. . . .[8]

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[8] The acknowledgement then cites the following internal rules: Rule 1.18 provides as follows: "Employees shall promptly obey any lawful orders of a superior. This will include orders relayed from a superior officer by an officer of the same of (sic) lesser rank."

Defendants' Motion for Summary Judgment, Exhibit One.

Before answering Lt. Fortney's questions, McKinley read into the tape recorder the following statement:

> I, Jeffrey T. McKinley, am giving the following statement by reason of an order from a superior officer, advising me that refusal to obey could result in disciplinary action. In view of possible job forfeiture, I have no alternative but to abide by this order. However, it is my belief and understanding that the Division of Police requires this statement solely and exclusively for Internal Administrative purposes, that it will be held as confidential and not released to any other agency without my approval unless mandated to do so by competent authority, or as necessary for disciplinary proceedings and appeals of such proceedings.

Feb. 25 Tr., at 1.

After reading this statement, Lt. Fortney asked McKinley a series of general questions about Scannergate and specific questions about the arrest of William Noble. McKinley denied

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Rule 1.52 provides as follows: Upon the order of the Chief, or the Chief's designee, employees shall truthfully answer all questions specifically directed and narrowly related to the scope of employment and operations of the Division which may be asked of them.

Id.

having any general knowledge regarding the use, by himself or his fellow officers, of radio scanners to intercept and eavesdrop on private cell or cordless phone conversations. When asked specific questions about the February 3rd arrest of Mr. Noble, McKinley denied that any officer at the scene supplied any information to him about the contents of Noble's cell phone call. At the end of the interview, McKinley signed the transcript of the interview, stating, "I swear or affirm that the contents are true and correct to the best of my knowlege." *Feb. 25 Tr.*, at 7.

On February 29, 2000, Fortney and Goldsmith took a taped statement from Mr. Noble confirming that he had in fact made the cell phone call during his arrest on February 3, 2000. After receiving this additional information, Fortney decided to re-interview Officer McKinley.

Prior to the second interview on March 7, 2000, Goldsmith and Fortney explained to Officer McKinley that they had obtained evidence which caused them to believe that he had been untruthful when answering their questions on February 25th. They advised McKinley that this second interview would be his opportunity to tell the truth. McKinley accepted their offer to have a union representative, Officer Daniel Martincin, present during the interview. Prior to asking McKinley questions, Lt. Fortney read into the tape recorder the following statement:

> Today's date is Tuesday, March 7th, 2000. Lt. Fortney and Lt. Goldsmith are in the office of the METRICH Drug Task Force. We're in the conference room. We've called Jeff McKinley back out to be re-interviewed. He has been advised that he's still under Garrity. He was asked if he wanted a rep. present. He stated that he did and Dan Martincin came to the

> Special Investigative Unit and sat on the pre-interview. We are preparing now to re-interview Jeff McKinley and we'll go over the statement form that he gave to the investigating officers on 2/25/2000. It's been determined prior to this interview that he was not truthful at the time he gave the interview on 2/25/20000. He will be asked, again, the same questions and will give his responses.

March 7 Tr., at 1.

During this second interview, McKinley provided many answers that contradicted those he provided on February 25th. He admitted to having used a radio scanner himself to eavesdrop on private conversations between 1995 and 1998. McKinley detailed his knowledge regarding his fellow officers' use of scanners to eavesdrop on private cordless or cell phone calls. He admitted that Officer Foster had overheard Mr. Noble's cell phone call on February 3, 2000 and had related the substance of that call to him and Sgt. Nirode. However, he stated that he had arrested Mr. Noble for intoxication prior to the arrival of Officer Foster based on Sgt. Nirode telling him that the jail was no longer crowded. On March 8, 2000, Fortney ordered McKinley to sign the transcript of the March 7th interview. Although McKinley signed the transcript, he refused to swear to it.

The information acquired during the Scannergate investigation was referred to Stephen D. Knowling, prosecuting attorney for Holmes County, Ohio, who acted as special prosecutor in this matter, for his review, evaluation, and determination of whether, and if so whom, to prosecute.

C. Disciplinary Proceedings

Following the investigation, McKinley was charged by the City of Mansfield Police Department with violating Department Rules 1.02, (Conduct Unbecoming a Police Officer), and 1.52 (Truthfulness). On March 20, 2000, McKinley was suspended with pay pending a pre-disciplinary conference. A disciplinary hearing was held by the Police Department on April 12, 2000. On April 19, 2000, Chief Harper recommended that McKinley be suspended for 120 days without pay. On April 21, 2000, Mansifeld's Service/Safety Director, Defendant Ron Kreuter terminated McKinley's employment. Because McKinley was a member of the Fraternal Order of Police, Ohio Labor Council, Inc. (the "Union"), the Union had the right to arbitrate the termination of his employment pursuant to its collective bargaining agreement with the City of Mansfield, and exercised that right.

The employment dispute proceeded to arbitration before arbitrator James M. Klein, Esq. who rendered an award on February 19, 2002. Klein ruled that McKinley's termination was not supported by just cause, and ordered that McKinley be reinstated with back pay and benefits, with the exception of the 120 days the Chief of Police had originally recommended that McKinley be suspended.[9] Klein found that McKinley's punishment was disproportionate to the other officers; consequently, he ruled that McKinley should be reinstated.

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[9] The Arbitration Opinion of Fraternal Order of Police, Ohio Labor Council, Inc., City of Mansfield is located at *Defendants' Motion for Summary Judgment, Messer Declaration, Exhibit Seven.*

D. State Court Proceedings

Meanwhile, based on the information in his possession, Knowling decided to bring charges on behalf of the State of Ohio against McKinley for falsification in violation of Ohio Revised Code § 2921.13, obstruction of official business in violation of O.R.C. § 2921.31, and interference with civil rights in violation of O.R.C. § 2921.45. On March 30, 2000, a summons was issued commanding McKinley to appear on April 11, 2000 to answer these criminal charges. Following the Mansfield Municipal Court's consideration of a motion on McKinley's behalf, the criminal charge of interfering with civil rights was dismissed. On June 14, 2000, Plaintiff filed motions to suppress the February 25, 2000 and March 7, 2000, transcripts as evidence in the criminal case. On September 29, 2000, the Court overruled the motions to suppress. On July 25, 2001, the State of Ohio and McKinley proceeded to trial by jury on two charges of falsification and one charge of obstructing official business. The jury convicted McKinley on all three counts on July 26, 2001.

On June 25, 2002, the Richland County Court of Appeals reversed the judgment of the Mansfield Municipal Court, finding that the trial court erred in permitting the use of McKinley's February 25 and March 7, 2000 statements at his criminal trial, and vacated McKinley's convictions. *See State v. McKinley*, No. 01CA98, 2002 WL 1732136 (Ohio App. 5 Dist. Jun. 25, 2002). The court reached its decision by interpreting the contractual language of the agreement signed by McKinley, Fortney, and Goldsmith, holding, "[A]lthough we find such a promise to be contra to the philosophy of *Garrity*, any statements given with this carte blanc promise of immunity are protected." *Id.*, 2002 WL 1732136, at *3.

On November 11, 2002, Plaintiff filed the instant action in federal court. Defendants filed the pending summary judgment motion, which has been fully briefed.

II.STANDARD OF REVIEW

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). All facts and inferences drawn therefrom must be viewed in a light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 403 (6th Cir. 1997). If, after reviewing the record as a whole, a rational factfinder could not find for the nonmoving party, summary judgment is appropriate since there is no genuine issue of material fact for determination at trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III.LAW AND ANALYSIS

A.42 U.S.C. § 1983 and Qualified Immunity

A civil action may be brought against state officials who deprive a citizen of his or her constitutional rights under 42 U.S.C. § 1983. Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,...

At the same time, the affirmative defense of qualified immunity "shields 'government officials performing discretionary functions. . . from liability for civil damages insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known.'" *Gardenhire v. Schubert*, 205 F.3d 303, 310-11 (6th Cir. 2000) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). *See also Jackson v. Leighton*, 168 F.3d 903, 909 (6th Cir. 1999). In determining whether a constitutional right is clearly established, the Court must look first to decisions of the Supreme Court, then to decisions of the Sixth Circuit and its district courts, and finally, if necessary, to decisions of other circuits. *Daugherty v. Campbell*, 935 F.2d 780, 784 (6th Cir. 1991), *cert denied*, 502 U.S. 1060 (1992).

Before determining whether the right violated was clearly established or examining the reasonableness of a defendant's conduct in relation thereto, the Court should decide as a preliminary matter whether a violation of constitutional rights occurred at all. *Jackson*, F.3d at 909 (*citing Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *County of Sacramento v. Lewis*, 118 S.Ct.1708, 1714 n.5 (1998)). If the Court determines that no right was in fact violated, then the qualified-immunity analysis is concluded. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). While qualified immunity is an affirmative defense asserted by the defendant, the ultimate burden of proof is on the plaintiff to show that the defendant

is not entitled to qualified immunity.[10] *Gardenhire*, 205 F.3d at 310-11.

B. Count I - Fourth Amendment Malicious Prosecution Claim

McKinley claims that his Fourth Amendment rights were violated when Defendants maliciously prosecuted him despite promising not to. *See Plaintiff's Response to Defendant's Motion for Summary Judgment, ECF No. 14* (hereafter "Plaintiff's Response"), at 15. However, it is clearly established law that the discretion to prosecute lies with the prosecutor. "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Wayte v. United States*, 470 U.S. 598, 607 (1985) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). Moreover, prosecutors are absolutely immune from liability under § 1983 for their conduct in initiating a prosecution and in presenting the State's case. *Burns v. Reed*, 500 U.S. 478, 485-86 (1991); *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). According to the Supreme Court:

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[10] In *Gardenhire*, the Sixth Circuit stated:

> Where a defendant moves for summary judgment based on qualified immunity, the plaintiff must first identify a clearly established right alleged to have been violated and second, establish that a reasonable officer in the defendant's position should have known that his conduct violated that right. *See Pray v. City of Sandusky*, 49 F.3d 1154, 1158 (6th Cir. 1995); *Johnson v. Estate of Laccheo*, 935 F.2d 109, 111 (6th Cir. 1991). 205 F.3d at 311.

> [A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made.

Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993).

Here, McKinley is trying to do indirectly that which he cannot do directly, i.e., he is suing defendant police officers and city officials for the Special Prosecutor's decision to prosecute him. But the Sixth Circuit has held that a police officer "cannot be held liable for malicious prosecution when he did not make the decision to prosecute [the plaintiff]." *Skousen v. Brighton High School*, 305 F.3d 520, 529 (6th Cir. 2002). McKinley has provided no evidence that any of the Defendants made the decision to prosecute him, or that any of them participated in, or influenced, the Special Prosecutor's decision to prosecute him. Perhaps recognizing this obstacle, McKinley argues that the named Defendants bear some responsibility for passing the allegedly false evidence (i.e., the March 7th transcript) up the chain, so that Prosecutor Knowling relied on it in making the decision to prosecute him. *Plaintiff's Response*, at 23-24. This argument is, at best, weak.

First, as noted *supra*, at 3-5, there is no evidence that any of the Defendants altered the tape after the March 7th interview was concluded.

Second, even if McKinley could show that the Defendants had any influence on the Special Prosecutor's decision to prosecute him, his Fourth Amendment claim would still fail. While the Sixth Circuit has not articulated the elements of a federal malicious prosecution claim,[11] it has made clear that a plaintiff must allege and prove more than malicious prosecution under state law. *Frantz v. Bradford*, 245 F.3d 869, 875-76 (6th Cir. 2001). A federal malicious prosecution claim must rest on a constitutional violation and, if it is a Fourth Amendment violation, the plaintiff must show that "there was no probable cause to justify [the plaintiff's] arrest and prosecution." *Darrah v City of Oak Park*, 255 F.3d 301, 312 (6th Cir. 2001).

In this case, there was ample evidence, even without the March 7th transcript, to justify McKinley's prosecution for falsification and obstruction of official business. The falsification statute provides, "No person shall knowingly make a false statement when. . . [t]he statement is made in any official proceeding." O.R.C. § 2921.13(A)(1). The following evidence established probable cause that McKinley violated § 2921.13(A)(1): the February 25th transcript in which McKinley denied having any knowledge about the unlawful use of radio scanners; Sgt. Nirode's statement that Officer Foster divulged the contents of Mr. Noble's February 3rd cell phone call to McKinley; and Mr. Noble's confirmation of that call.

The same evidence justified McKinley's prosecution for obstruction of official business. Under O.R.C. § 2921.31,

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[11] *See Peterson Novelties Inc. v. City of Berkley*, 305 F.3d 386, 396 (6th Cir. 2002); *Darrah v. City of Oak Park*, 255 F.3d 301, 312 (6th Cir. 2001).

> No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties.

Id. The aforementioned evidence was also sufficient to establish probable cause that McKinley obstructed or delayed the investigating officers' performance of their lawful duties. In sum, McKinley cannot establish a federal constitutional malicious prosecution claim against the Defendants because (1) there is no evidence that the Defendants made or influenced the decision to prosecute McKinley, and (2) probable cause existed to prosecute McKinley for falsification and obstruction of official business. In the absence of a Fourth Amendment violation, the Court must conclude its qualified immunity analysis and dismiss this claim on the merits. *Saucier*, 533 U.S. at 201. *See also Jackson*, 168 F.3d at 909; *Siegert*, 500 U.S. at 232; *Lewis*, 118 S.Ct. at 1714, n.5.

C. Count V - Fifth Amendment *Garrity* Claim

McKinley also claims that his Fifth Amendment rights under *Garrity v. New Jersey*, 385 U.S. 493 (1967), were violated when Defendants used his immunized statements against him in his criminal trial. *Plaintiff's Response*, at 15. More specifically, McKinley argues that "it was Lt. Fortney who introduced into evidence at [McKinley's] criminal trial his allegedly false statements . . . ." *Id.*, at 25 (emphasis added). This argument is meritless.

McKinley faces the same problem here that he encountered with his Fourth Amendment claim. It is the

Special Prosecutor who used the transcripts to establish the State's case against him - not the Defendants. As discussed above, acts undertaken by a prosecutor, including the professional evaluation of the evidence assembled by the police and the decisions made in presenting the State's case to the jury, are absolutely immune from § 1983 liability. *Buckley*, 509 U.S. at 273; *Burns*, 500 U.S. at 485-86; *Imbler*, 424 U.S. at 431; *Higgason v. Stephens*, 288 F.3d 868, 878 (6th Cir. 2002).

Nonetheless, McKinley argues that Defendants violated his Fifth Amendment rights by forcing him to give self-incriminating statements, falsifying those statements, and then inducing the Special Prosecutor to use the falsified statements in his criminal prosecution. *Plaintiff's Response*, at 24. This argument is equally meritless.

The Sixth Circuit has made clear that public officials investigating internal misconduct may require police officers to answer employment-related questions or face possible job loss without violating the Fifth Amendment under *Garrity*. *See Lingler v. Fechko*, 312 F.3d 237, 240 (6th Cir. 2002) (holding that police officers make no tenable claim that a Fifth Amendment violation occurs when a police department merely exercises its legitimate right, as an employer, to question them about matters narrowly relation to their job performance). In *Garrity*, a government employee was forced to chose between testifying truthfully about an employment-related issue and potentially incriminating himself, or losing his job. The Supreme Court held, "[T]he protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." *Id.* at 500. Courts have since interpreted *Garrity* as prohibiting the use of incriminating statements made by public

employees under threat of job loss in subsequent criminal proceedings concerning the matter under investigation, *United States v. Veal*, 153 F.3d 1233 (11th Cir. 1998), *cert. denied*, 526 U.S. 1147 (1999), and providing immunity to public employees who testify truthfully about employment-related issues when faced with job loss as the alternative, *Driebel v. City of Milwaukee*, 298 F.3d 622, 638 n.8 (7th Cir. 2002). In this way, *Garrity* has been said to strike a balance between the individual's privilege against compelled self-incrimination and the State's interest in obtaining information necessary to ensure public confidence in its institutions. *See, e.g., United States v. Vangates*, 287 F.3d 1315, 1320 (11th Cir. 2002) (citing *Lefkowitz v. Turley*, 414 U.S. 70, 81 (1973)). Consequently, it is not the coercion of the police officer's statements that violates the Fifth Amendment, but the use of the statement in subsequent criminal proceedings concerning the matter under investigation. *Lingler*, 213 F.3d at 239, *Veal*, 153 F.3d at 1236, n.1.

In addition, there is no evidence that the investigating officers "falsified" the tapes, and there is no evidence that any of the Defendants "induced" the Special Prosecutor to use McKinley's statements in his criminal case. As previously noted, there is no evidence that the Mansfield Division of Police did anything other than turn over the evidence they accumulated during the Scannergate investigation to the Special Prosecutor.

McKinley also contends,

> The real question here is not whether plaintiff can be criminally prosecuted for lying during a Garrity statement. Clearly he can be so prosecuted. The real question is whether the state can use a second Garrity-

> protected statement as evidence that plaintiff lied in the first Garrity- protected statement.

Plaintiff's Response, at 23. This argument fails for the following reasons.

First, the only representative of the State who "used" McKinley's March 7th statements against him in court was the Special Prosecutor. As discussed above, the Special Prosecutor is absolutely immune from suit.

Second, this Court is collaterally estopped from deciding whether the use of McKinley's statements in his criminal trial violated *Garrity* because the Ohio Court of Appeals already decided this legal issue and held that it did not. The Ohio Court of Appeals framed the *Garrity* issue in the following manner:

> The very limited issue raised in appellant's motion to suppress and this assignment of error is whether the granting of immunity given pursuant to *Garrity v. State of New Jersey* (1967), 385 U.S. 493, . . ., extends to false statements given during a police internal affairs department interview. The exact language of the *Garrity* rule is as follows:
>
> > . . ."We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic."

State v. McKinley, No. 01CA98, 2002 WL 1732136, at *2 (Ohio App. 5 Dist. Jun. 25, 2002) (quoting *Garrity*, 385 U.S. at 500). After reviewing the grant of immunity extended to McKinley, the Ohio appeals court conducted its *Garrity* analysis:

> . . . *Garrity* encompasses the philosophy that internal affairs departments "must be given the latitude to conduct investigations to ensure the continued integrity of the department.* * * Without such a mandate, the IAD cannot ensure the integrity and trustworthiness of the department's officers and the public cannot be assured of the propriety of placing its trust in these public servants." *Jones v. Franklin County Sheriff* (1990), 52 Ohio St.3d 40, 44, ... Included in this philosophy is the premise that once immunity is granted, the interviewee will answer truthfully.
>
> . . .Ohio only recognizes by statute transactional immunity (R.C. 2939.17 and R.C. 2945.44). Included in both of these statutes is the provision that an immune person can be prosecuted for violating R.C. 2921.11 (perjury), R.C. 2921.12 (tampering with evidence) or R.C. 2921.13 (falsification).
>
> . . .Given the basic philosophy expounded by Justice Wright in *Jones* and Ohio's statutory transactional immunity, we find that despite the *Garrity* provisions, a person can be prosecuted for falsification during an internal affairs interview and investigation.
>
> . . .Our inquiry cannot stop with this answer. Within the warning given by the investigators is the promise "the Division of Police will not use any of the answers

> or information gained from the interview in any criminal proceeding against you." With this statement, appellant was assured that he could speak freely without the threat of criminal prosecution. The "Division of Police" specifically promised not to use "any of the answers" against appellant. By so promising, they precluded the use of any of appellant's statements against him in a criminal proceeding. Although we find such a promise to be contra to the philosophy of *Garrity*, any statements given with this carte blanc promise of immunity are protected. One must assume that the voluntariness of appellant's answers were predicated on this promise of unconditional immunity. Such a promise can be as coercive as a direct threat or the exertion of subtle pressure. *Blackburn v. Alabama* (1960), 361 U.S. 199, . . . ; *Leyra v. Denno* (1954), 347 U.S. 556, . . .
>
> . . . We realize that our ruling today may send a message that it is all right to give false information in a *Garrity* area. We do not mean to condone such possibility. Our ruling is limited to the unnecessary "carte blanc" immunity given in this case to force the statements from appellant. We find it was error to permit the use of appellant's statements at trial.

2002 WL 1732136, at *2-3 (paragraph numbers and parallel citations omitted). Thus, the Ohio appeals court concluded that, while the use of McKinley's statements violated the Mansfield police department's promise of immunity, the use of the statements did not violate *Garrity*. However, parties cannot, by agreement, expand constitutional rights, thus elevating a breach of contract to a violation of constitutional proportions. *See, e.g., Toledo Police Patrolman's Ass'n v. City of Toledo*, 716 F.Supp. 300, 301-02 (N.D. Ohio 1988)

(holding in a § 1983 claim brought by police officers against city that *Garrity* rights cannot be contractually expanded by parties to collective bargaining agreement), *aff'd without opinion*, 869 F.2d 1493 (6th Cir. 1989) (table); *Cagle v. Sullivan*, 334 F.3d 980, 986 (11th Cir. 2003) (holding that consent decree, which arose out of voluntary settlement of prior jail conditions action and was not based on a finding of any constitutional violation, could not expand constitutional rights; thus, county's violation of consent decree without more did not establish a violation of detainee's constitutional rights under § 1983) (citations omitted)).

In *Brown v. City of Detroit*, the Sixth Circuit held that "issues which were previously decided in a criminal proceeding may have a collateral estoppel effect in a subsequent § 1983 civil rights action as long as the state court 'has given the parties a full and fair opportunity to litigate federal claims and thereby has shown itself willing and able to protect federal rights.'"[12] 47 Fed.Appx. 339, 2002 WL

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[12] While collateral estoppel (or issue preclusion) is an affirmative defense normally raised by the parties, the Sixth Circuit has noted that the circuit court may raise the issue *sua sponte* "where a purely legal issue provides alternative grounds to uphold the judgment of the district court, . . . provided the record permits its resolution as a matter of law." *Hutcherson v. Lauderdale County, Tennessee*, 326 F.3f 747, 756 (6th Cir. 2003) and cases cited therein. There is no reason to conclude that this holding does not apply equally to the district court. *Id.* at 756 (the doctrine of res judicata belongs to both the litigants and the courts in that "it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste."). The circumstances of this case justify *sua sponte* recognition of collateral estoppel because the Ohio Court of Appeal's decision is part of the record, the *Garrity* issue in this case is identical to the *Garrity* issue adjudicated in the state courts,

31114766, at **3 (6th Cir. Sep. 23, 2002) (citing *Allen v. McCurry*, 449 U.S. 90, 103-04 (1980)). McKinley had a full and fair opportunity to litigate this legal issue in the state courts, and did not appeal the Ohio Court of Appeals' ruling to the Ohio Supreme Court. Thus, the state court's ruling that the use of McKinley's statements did not violate the Fifth Amendment under *Garrity* precludes relitigation of this legal issue in federal court. *Id.*

Third, even if McKinley's *Garrity* claim is not issue-precluded, it would still fail because McKinley cannot show that the prosecutor's use of the March 7th transcript in the criminal trial violated a clearly established constitutional right. In determining whether the constitutional right allegedly violated was clearly established, the Court must look first to decisions of the Supreme Court, then to decisions of the Sixth Circuit and its district courts, and finally, if necessary, to decisions of other circuits. *Daugherty*, 935 F.2d at 784.

To begin, there is no federal case on point, let alone binding Sixth Circuit or Supreme Court case law, that addresses or resolves the issue of whether *Garrity*-immunized statements made during one interview may be used to prove that the declarant lied during an earlier *Garrity*-immunized interview. For this reason alone, McKinley is unable to show the violation of a clearly established Fifth Amendment right.[13]

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and McKinley had a full and fair opportunity to litigate this issue in his state court proceedings.

[13] Since this is not the type of case involving extreme conduct where no reasonable officer could believe his conduct was acceptable, the absence of case law undercuts McKinley's claim that Defendants violated his clearly established Fifth Amendment rights under *Garrity*. *See, e.g., Hope v. Pelzer*, 536 U.S. 730

It is also clear that neither the Fifth Amendment nor *Garrity* protects false immunized statements. *United States v. Apfelbaum*, 445 U.S. 115 (1980) (holding that neither the federal use immunity statute nor the Fifth Amendment precludes using a defendant's false statements in a subsequent criminal prosecution for making false statements to a grand jury); *United States v. Veal*, 153 F.3d 1233 (11th Cir. 1998), *cert. denied*, 526 U.S. 1147 (1999) (affirming the district court's ruling that neither *Garrity* nor the Fifth Amendment protects false immunized statements from being used in subsequent prosecutions for crimes such as perjury or obstruction of justice); *United States ex rel. Annunziato v. Deegan*, 440 F.2d 304 (2d Cir. 1971) (upholding public employee's conviction for perjury based on testimony obtained under threat of discharge); *United States v. Devitt*, 499 F.2d 135 (7th Cir. 1974) (affirming convictions of Chicago police officers for giving false statements before a federal grand jury despite *Garrity* immunity); *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 859 F.2d 276, 281 (3d Cir. 1988) (reversing district court injunction against city for requiring police department applicants for special investigation unit to answer questionnaire seeking medical information, information concerning police officer's behavior and financial information of officer and his family)). In addition, the Supreme Court has held that both truthful and untruthful statements made under a grant of use immunity can be used to prove that the declarant perjured himself, *Apfelbaum*, 445 U.S. 115. As McKinley acknowledges on

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(2002) (§ 1983 prisoner plaintiff need not cite factually similar cases to establish that defendant prison guards violated his clearly established Eighth Amendment right to be free from cruel and unusual punishment where defendants ordered plaintiff to remove his shirt before chaining him to a post for eight hours in the hot sun without any bathroom breaks and only one or two water breaks.)

page 18 of his response memorandum, numerous courts have concluded that *Garrity* immunity is tantamount to use immunity. *See Plaintiff's Response*, at 18 (citing *Veal*, 153 F.3d at 1240, n.7; *United States v. Koon*, 34 F.3d 1416, 1431, n.11 (9th Cir. 1994) in turn citing *Kastigar v. United States*, 406 U.S. 441 (1972)). *See also Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 426 F.2d 619, 626 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972); *Modrowski v. Dep't of Veterans Affairs*, 252 F.3d 1344, 1350-51 (Fed. Cir. 2001); *United States v. Frazier*, 971 F.2d 1076, 1080-87 (4th Cir. 1992). In the instant case, there are two *Gareth*-immunized statements made by McKinley; one denying any knowledge regarding Scannergate, the other detailing his knowledge regarding Scannergate. The statements are materially inconsistent. Both statements cannot be true. The Court need not determine which of the statements is true to conclude that the law does not prohibit the use of materially inconsistent immunized statements in a trial for perjury or obstruction of justice. *Apfelbaum*, 445 U.S. 115

Finally, in the absence of binding precedent on the precise issue articulated by McKinley (i.e., whether or not *Gareth*-immunized statements may be used to prove that the declarant lied in an earlier *Garrity*-immunized statement), the Court finds that the Eleventh Circuit decision in *Veal* is instructive. In *Veal*, police officers who witnessed the death of a drug dealer gave false or misleading answers to questions put to them by state homicide investigators regarding their knowledge of the circumstances surrounding the drug dealer's death. In a subsequent trial charging the officers with infringing the drug dealers' civil rights, the district court granted the officers' motion to suppress their statements based on *Garrity*, and the officers were acquitted of this charge. However, in a subsequent trial against the officers for knowingly misleading the state investigators, the same district

court denied the officers' *Gareth* suppression motion. In affirming the district court's decision, the Eleventh Circuit held that, while *Gareth*-immunized statements may not be used against the officers in a criminal prosecution concerning the matter under investigation, they could be used in a subsequent prosecution for knowingly misleading the homicide investigation. In this case, the matter under investigation during both of McKinley's interviews was the unlawful use of radio scanners by Mansfield police officers. McKinley's statements were not used against him in a prosecution for the unlawful use of radio scanners. They were used to prove that he lied during an official investigation.

Because McKinley cannot establish the violation of a clearly established Fifth Amendment right, let alone a Fifth Amendment violation, the Court must conclude its qualified immunity analysis and dismiss this claim as well. *Saucier*, 533 U.S. at 201; *Jackson*, 168 F.3d at 909; *Siegert*, 500 U.S. at 232; *Lewis*, 118 S.Ct. at 1714, n.5; *Gardenhire*, 205 F.3d at 310-11.

C. Claims against City of Mansfield

McKinley has also sued the City of Mansfield under § 1983 to recover for the constitutional torts allegedly committed by the named Defendants. In order for McKinley to establish § 1983 liability against the City, he must demonstrate that a deprivation of a constitutional right resulted from a City policy or custom. *Monell v. Dept. of Social Services City of New York*, 436 U.S. 658, 690-91 (1978). This McKinley is unable to do because, as discussed above, he cannot show that any of the individual Defendants violated his Fourth or Fifth Amendment rights. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). Nor has he articulated a City policy or custom that caused any perceived

deprivation, *Id.* Accordingly, McKinley's constitutional claims against the City must necessarily fail.

IV. CONCLUSION

Based on the foregoing, Plaintiff's Motion to Strike and for Sanctions (ECF No. 15) is **DENIED**; Defendants' Cross Motion for Sanctions (ECF No. 18) is **DENIED**; and Defendants' Motion for Summary Judgment (ECF No. 11) is **GRANTED** and the federal claims are **DISMISSED WITH PREJUDICE**.

Because all the federal claims are dismissed, the Court will exercise its discretion to **DISMISS WITHOUT PREJUDICE** the state law claims. 28 U.S.C. § 1367(c)(3); *Street v. Corr. Corp. of America*, 102 F.3d 810, 818 (6th Cir.1996).

IT IS SO ORDERED.

/s/ _____
Dan Aaron Polster
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:02 CV 2339

[Filed August 27, 2003]

JEFFREY McKINLEY,	)
Plaintiff,	)
	)
v.	)
	)
CITY OF MANSFIELD, et al.,	)
Defendants.	)
	)

JUDGE DAN AARON POLSTER

JUDGMENT ENTRY

For the reasons stated in the Memorandum of Opinion and Order filed contemporaneously with this Judgment Entry, and pursuant to Federal Rule of Civil Procedure 58, it is hereby **ORDERED, ADJUDGED AND DECREED** that the above-captioned case is hereby terminated and dismissed as final.

/s/ _____
Dan Aaron Polster
United States District Judge

2

No. 05-451

In The
Supreme Court of the United States

CITY OF MANSFIELD, OHIO, et al.,

Petitioners,

v.

JEFFREY MCKINLEY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

KENNETH D. MYERS
[Ohio – 0053655]
Counsel of Record

75 Public Square, Suite 1300
Cleveland, OH 44113
(216) 241-3900

Counsel for Respondent

Dated December 7, 2005

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether this Court should decline to review, on the grounds that the United States Court of Appeals for the Sixth Circuit, correctly decided this case and because this case does not present any important national issues, the Sixth Circuit's decision in this case.

LIST OF PARTIES TO THE PROCEEDINGS

The Petitioners in this case are City of Mansfield, Ohio, Lawrence Harper, Philip Messer, Ronald Kreuter, Dale Fortney, and Robert Konstam.

Respondent is Jeffrey McKinley.

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INTRODUCTION

This case arises out of an internal investigation conducted by the Mansfield, Ohio Police Department. Respondent Jeffrey McKinley is and was a police officer for the Petitioner City of Mansfield and was initially questioned as part of the investigation that became known as "Scannergate," because several police officers were discovered to have been illegally listening to citizens' private telephone conversations through the use of police scanners.

Contrary to Petitioners' misleading formulation of the issues, this case is not about whether a municipal employer may be sued under 42 U.S.C. § 1983 when they conduct a lawful *Garrity* interview and question a police officer about job-related misconduct under threat of termination if an independent prosecutor later introduces the officer's statements against him in a criminal trial. It is also not about whether a municipality and city officials who conduct a *Garrity* interview can be held liable for providing the interviewee's statements to an independent prosecutor, or whether a municipal official can be held liable for testifying as a witness in a criminal trial, pursuant to a prosecutor's direction, about the substance of a municipal employee's statements obtained pursuant to a *Garrity* interview. (Pet. i.)

The real issue, which was correctly elucidated and decided by the U.S. Sixth Circuit Court of Appeals, is whether a municipality can promise an employee immunity through *Garrity* and then renege on that promise by charging the employee criminally, without incurring civil liability for violating the employee's constitutional right against self-incrimination.

Petitioners act as though the fact that Respondent was officially charged and tried by an independent prosecutor somehow immunizes the municipality and its officials from liability. However, without the acts of the Petitioners, the independent prosecutor would never have been able to prosecute the Respondent.

The Petitioners seem to acknowledge that Respondent's Fifth Amendment rights were violated by his criminal prosecution, but they claim that the person who violated those rights, the independent prosecutor, is immune. However, it was the acts of the Petitioners leading up to the prosecution that violated Respondent's Fifth Amendment rights, not merely the actions of the prosecutor.

This is not an issue that the U.S. Supreme Court should deal with, mainly because the instances when a municipality so blatantly violates its employees' Fifth Amendment rights by forcing them to incriminate themselves in the course of a *Garrity*-immunized internal investigation are (thankfully) so rare that such a scenario is unlikely to be repeated. Contrary to the assertions of the Petitioners, the Sixth Circuit's decision in this case did not create a "new remedy" for violations of a public employee's Fifth Amendment rights. (Pet. 4.) It merely reinforced the obvious; that if a public employer promises an employee *Garrity* immunity in an internal investigation, thus forcing an employee to waive his Fifth Amendment rights to remain silent and not to testify against himself, the employer will be held accountable if it breaks that *Garrity* promise.

STATEMENT OF THE CASE

The facts and background about this case are succinctly and correctly stated by the Sixth Circuit in its opinion in this case at App. 5a-16a and, for the sake of brevity, will only generally be recounted here.

Respondent Jeffrey McKinley is a police officer for the Mansfield Police Department. He alleges that during the course of an internal police department investigation into whether police officers illegally used radio scanners to eavesdrop on citizens, he was called in for two interviews, the first one on February 25, 2001 and the second one on March 7, 2001. During both interviews, he was promised, in writing, that nothing he said would be used against him in any criminal proceedings. These promises were made unequivocally, without regard to the truth or falsity of his statements.

Prior to the first interview, these promises were reduced to writing; McKinley read one such statement into the tape recorder. The statement read:

> I, Jeffrey T. McKinley, am giving the following statement by reason of an order from a superior officer advising me that refusal to obey could result in disciplinary action.
>
> In view of possible job forfeiture, I have no alternative but to abide by this order. However, it is my belief and understanding that the Division of Police requires this statement *solely and exclusively* for Internal Administrative purposes, that it will be held as confidential and not released to any other agency without my approval unless mandated to do so by competent authority, or as necessary for disciplinary proceedings and appeals of such proceedings. (emphasis added.)

McKinley also signed Directive No. 12.003, which read, in pertinent part:

> You are hereby advised that you are about to be questioned as part of an official administrative investigation of the Division of Police. You will be asked specific question (sic) which will relate directly and narrowly to the performance of your official duties or fitness as an employee or member of the Division of Police. The purpose of this interview is to assist in determining whether disciplinary action is warranted, and the answers furnished may be used in disciplinary proceedings that could result in administrative action against you.
>
> Because this is an administrative and not a criminal investigation, *the Division of Police will not use any of the answers or information gained from the interview in any criminal proceeding against you.* (emphasis added.)

(App. at 6a.)

Before the first interview, McKinley was told by his union representative that the investigators were only interested in his answers if they were based on direct knowledge and only based on incidents occurring within the previous year.

After the first interview, which was tape-recorded, McKinley read a transcript of the interview, and swore that it contained truthful information.

The second interview was conducted under the same *Garrity v. New Jersey*, 385 U.S. 493 (1967) ground rules and the same orders cited above. But prior to this interview, McKinley was told that this time he was to answer

by giving any information he possessed, including hearsay, innuendo and rumor, and that there was to be no limitation on the time frame of his answers.

The second interview was also tape-recorded, but the tape was not started right away. There was a 10-15 minute "pre-interview," during which McKinley was told by one of the investigators, Lt. Dale Fortney, that the investigators believed he had been untruthful during the first interview.

Despite this accusation that he had lied under oath, McKinley was not given a *Miranda* warning, nor was he told he was under criminal investigation or that he had any right to remain silent.

A transcript of the tape was written up and given to McKinley. He refused to swear to it and noted on the back of it that it was "not accurate."

On the tape of the second interview, McKinley purportedly gave different answers to the same questions that were asked at the first interview, and he purportedly admitted giving untruthful answers during the first interview in order to protect another officer and one supervisor.

However, Lt. Fortney admitted in his deposition that he and the other investigator, Lt. Goldsmith (now deceased) selectively recorded McKinley's answers during the second interview. McKinley alleges, and Fortney admits, that Fortney and Goldsmith selectively recorded McKinley's answers; when the officers suspected that an answer was false, they would stop the tape, confront McKinley with their suspicion and suggest that he give a truthful answer. The officers would then rewind the tape to the end of the prior question-and-answer exchange and

re-ask the question that prompted the objectionable answer. Consequently, the tape recording and transcript of the second interview omit some or all of the answers Fortney and Goldsmith deemed false and the answers that are reflected on the recording and transcript contradict much of what McKinley said in his first interview. (App. at 9a.)

However, the second interview, which played such an important part in McKinley's criminal charges and conviction, was not merely manipulated by selective recording. It was manipulated by out-and-out alteration of the contents of the interview by erasing some of the questions and McKinley's original answers, as Lt. Fortney admitted in his deposition.

On March 20, 2000, McKinley was suspended with pay pending a pre-disciplinary conference.

On March 30, 2000, McKinley was charged criminally with falsification, a misdemeanor, in violation of Ohio Revised Code (O.R.C.) Section 2921.13, obstructing official business, a misdemeanor, in violation of O.R.C. Section 2921.31, and interfering with civil rights, a misdemeanor, in violation of O.R.C. 2921.45. The interfering with civil rights charge was dismissed prior to trial.

On April 12, 2000, a disciplinary hearing was held relative to McKinley's job.

On April 21, 2000, Mansfield's Service/Safety Director Ron Kreuter terminated McKinley's employment.

McKinley, through his union, appealed the termination.

On July 25, 2001, McKinley stood trial in Mansfield Municipal Court on two counts of falsification and one count of obstructing official business.

On July 26, 2001, a jury convicted McKinley on all three counts. McKinley appealed the decision.

The prosecutor introduced both tapes into evidence through Lt. Fortney, who was a witness in the criminal trial.

On February 19, 2002, an arbitrator reversed McKinley's termination and converted the termination into a 120-day suspension, granting McKinley full back pay and benefits (minus the 120 days pay).

On June 25, 2002, the Richland County Court of Appeals reversed the judgment of the Mansfield Municipal Court in the criminal matter, holding that the trial court erred in permitting the use of McKinley's February 25, 2000 and March 7, 2000 statements at his criminal trial, and vacated the convictions. *State v. McKinley*, WL 1732136 (Ohio App. 5 Dist. June 25, 2002).

On November 27, 2002, McKinley filed a complaint in the district court asserting claims under 42 U.S.C. § 1983 and several common law causes of action. The complaint named as defendants the city of Mansfield, Ohio and certain of its police officials, including Lt. Fortney.

The lawsuit alleged a violation of McKinley's Fifth Amendment right to be free from self-incrimination by compelling him in the second interview to make incriminating statements as to falsification and obstruction, which statements were later used at his trial for those crimes.

The defendants filed a motion for summary judgment, which the district court granted (McKinley had also

alleged a violation of his Fourth Amendment rights; the district court granted summary judgment on that claim, the Sixth Circuit affirmed that holding and that issue is not on appeal to this Court). The Sixth Circuit reversed the district court on the Fifth Amendment claim, holding that there was a genuine issue of material fact as to whether McKinley's Fifth Amendment rights had been violated.

Petitioners filed a Motion for Panel Re-hearing or Re-hearing *En Banc* before the Sixth Circuit. The Sixth Circuit denied Petitioners' Petition for Panel Re-hearing or Re-hearing *En Banc* on July 19, 2005.

Petitioners appeal to this Court to grant a Writ of Certiorari based on two reasons; first, they claim that the Sixth Circuit decision contradicts *Garrity* and its progeny. Second, they claim that this issue is of national importance because the decision impacts the ability of municipal employers to hold their employees accountable for their official conduct, thus undermining public confidence in and the effective functioning of the government.

Neither of these assertions are true; the Sixth Circuit's decision is directly in line with *Garrity* and its progeny. Further, contrary to the Petitioners' assertion, the decision does not impact the ability of municipal employers to hold their employees accountable for their official conduct, but rather it holds municipal employers accountable for their conduct and should be permitted to stand. Lastly, because of the unusual fact pattern of this case, the Sixth Circuit decision affects a relatively small number of employers and employees.

ARGUMENTS

1. THE SIXTH CIRCUIT'S DECISION IS NOT CONTRARY TO PRIOR CASE LAW.

The Fifth Amendment, applied to the states through the Fourteenth Amendment, provides that a person shall not be "compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. It guarantees "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8, 12 L.Ed.2d 653, 84 S.Ct. 1489 (1964). "The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77, 38 L.Ed.2d 274, 94 S.Ct. 316 (1973).

In *Kastigar v. United States*, 406 U.S. 441, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972), the U.S. Supreme Court declared that the Fifth Amendment's "sole concern is to afford protection against being 'forced to give testimony leading to the infliction of [criminal penalties].'" *Id.* at 453 (quoting *Ullmann v. United States*, 350 U.S. 422, 428-39, 100 L.Ed. 511, 76 S.Ct. 497 (1956). The high court held that a statute granting use and derivative use immunity does not violate the Fifth Amendment because it "prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Id.*

As the U.S. Supreme Court said in the landmark case of *Miranda v. Arizona*:

> . . . no distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word. . . .

Miranda v. Arizona, 384 U.S. 436, 476-77, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966).

The right to a *Miranda* warning of one's right to remain silent is more than a procedural safeguard.

> This warning is required as a procedural safeguard, but more importantly it expresses a substantive Constitutional right – the right to remain silent rather than answer incriminating questions posed by the police. It is wrong, therefore, to relegate this part of the advisement to the status of "only a prophylactic device": It is a prophylactic device, but it expresses a substantive right.

Cooper v. Dupnik, 963 F.2d 1220, 1239 (9th Cir. 1992).

A Section 1983 action may exist under the Fifth Amendment self-incrimination clause if coercion was applied to obtain a waiver of the plaintiff's rights against self-incrimination and/or to obtain inculpatory statements, if the statements thereby obtained were used against the plaintiffs in a criminal proceeding. *Weaver v. Brenner*, 40 F.3d 527, 535 (2d Cir. 1994). As the Ninth Circuit has said:

> Based on the foregoing, we conclude that Cooper adequately has stated a cause of action under Section 1983 for a violation in the sheriff's department of his clearly established Fifth Amendment right against self-incrimination. Barkman and his companions conspired not only to ignore Cooper's response to the advisement of rights pursuant to *Miranda*, but also to defy any assertion of the Constitution's Fifth Amendment substantive right to silence, and to grill Cooper until he confessed. Accepting the facts as they stand essentially uncontested in the record, Cooper's interrogators tried first to trick him into foregoing his right to silence by turning the *Miranda* advisement into a farce. The Supreme Court had this tactic in mind when it said:
>
> Moreover, any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

Miranda v. Arizona, *supra* at 476, cited in *Cooper v. Dupnik*, 963 F.2d 1220, 1242-43 (9th Cir. 1992).

The Fifth Amendment right also encompasses the right to consult with an attorney and to have an attorney (not a union representative) present during questioning.

Compelled testimony cannot be used for impeachment purposes, either. "Bluntly put, there is no such thing as an impeachment exception for compelled, coerced or involuntary statements. The clarity of this proposition is beyond question. . . ." *Cooper v. Dupnik*, 963 F.2d 1220, 1250 (9th Cir. 1992).

The key inquiry for Fifth Amendment purposes is whether the statement introduced in a judicial proceeding was obtained . . . by coercion – an inquiry determined by the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973); *Haynes v. Washington*, 373 U.S. 503, 513-14, 10 L.Ed.2d 513, 83 S.Ct. 1336 (1963), cited in *Deshawn E. v. Safir*, 156 F.3d 340 (2d Cir. 1998).

The United States Supreme Court said in *Garrity*:

> We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

Garrity v. State of New Jersey, 385 U.S. 493, 500 (1967).

The appellate courts that have considered the matter have concluded that the scope of *Garrity* immunity is commensurate with that of formally immunized testimony, meaning that the use restrictions applicable to immunized testimony and compelled statements are the same. *United*

States v. Veal, 153 F.3d 1233, 1240, n.7 (11th Cir. 1998) ("We can analogize between the scope of the federal use immunity statute . . . and *Garrity* analysis under the Fifth Amendment because our court has held that a *Garrity*-protected statement is tantamount to use immunity."); *United States v. Koon*, 34 F.3d 1416, 1431, n.11 (9th Cir. 1994) (noting that despite government concern about applying immunity doctrine to police officers' compelled statements, "because the use of compelled testimony in the *Garrity* context also directly implicates the individual's Fifth Amendment right against self-incrimination, *Kastigar*'s discussion of the scope of the Fifth Amendment privilege against self-incrimination is directly relevant in the *Garrity* context"), rev'd on other grounds, 518 U.S. 81 (1996).

Even if it can be shown that a statement was obtained by coercion, there can be no Fifth Amendment violation until that statement is introduced against the defendant in a criminal proceeding. See *Weaver*, 40 F.3d at 535; *Riley v. Dorton*, 115 F.3d 1159, 1164-65 (4th Cir. 1997); *Mahan v. Plymouth County House of Corrections*, 64 F.3d 14, 17 (1st Cir. 1995); *Mahoney v. Kesery*, 976 F.2d 1054, 1061-62 (7th Cir. 1992); *Davis v. City of Charleston*, 827 F.2d 317, 322 (8th Cir. 1987).

In *Weaver*, the court held that to constitute a Fifth Amendment violation, "use of the [coerced] statement at trial is not required," but that there must be some "use or derivative use of a compelled statement at any criminal proceeding against the declarant." *Weaver*, 40 F.3d at 535.

Retired Supreme Court Justice Lewis Powell, sitting by designation in the Fourth Circuit, opined that the language in the Supreme Court's Fifth Amendment jurisprudence

suggests that the right against self-incrimination is violated by "use of the compelled statements against the maker in a criminal proceeding." *Wiley v. Doory*, 14 F.3d 993, 996 (4th Cir. 1994).

In *Kastigar, supra*, the Supreme Court held that a grant of immunity "prohibits the prosecutorial authorities from using the compelled testimony in any respect . . . " and that immunity "therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Kastigar*, 406 U.S. at 453.

There is no question that in this case McKinley's statements were compelled. Courts have held police officers' statements to be compelled if a suspect officer believes that refusal to answer questions will cause him to lose his job and if there is an objective basis for the belief rooted in official action. *United States v. Friedrick*, 842 F.2d 382, 395 (D.C. Cir. 1988) (holding objectively reasonable belief sufficient to trigger *Garrity* protection); *United States v. Camacho*, 739 F.Supp. 1504, 1515 (S.D. Fla. 1990) (adopting *Friedrick* test).

The Sixth Circuit has recently weighed in on the matter.

In *Lingler v. Fechko*, 312 F.3d 237 (6th Cir. 2002), the Sixth Circuit dealt with a problem similar to the issue in this case; several officers filed a Section 1983 action against their police chief, alleging that the chief had violated their Fifth Amendment rights when he conducted an investigation into the officers' clean-up activities that resulted in police department furniture being thrown away without authorization. The police chief recommended that the officers be suspended for 30 days, but no

punishment of any kind was imposed, and criminal proceedings were not initiated against the officers.

The Sixth Circuit affirmed a grant of summary judgment in favor of the police chief, on the grounds that the Fifth Amendment did not prohibit the act of compelling self-incriminating statements other than those used in a criminal proceeding. The Sixth Circuit stated:

> By its terms, the Fifth Amendment does not prohibit the act of compelling a self-incriminating statement other than for use in a criminal case. See *Deshawn E. v. Safir*, 156 F.3d 340, 346-47 (2d Cir. 1998) ("Even if it can be shown that a statement was obtained by coercion, there can be no Fifth Amendment violation until that statement is introduced against the defendant in a criminal proceeding"); *Mahoney v. Kesery*, 976 F.2d 1054, 1061-62 (7th Cir. 1992) (quoting *Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989), to the effect that "the Fifth Amendment does not forbid the forcible extraction of information but only the use of information so extracted as evidence in a criminal case . . . ").
>
> The statements given by [the plaintiffs] were not used against them in any criminal case. Indeed, under *Garrity v. New Jersey*, 385 U.S. 493, 17 L.Ed.2d 562, 87 S.Ct. 616 (1967), *the statements could not have been so used.* See *Garrity*, 385 U.S. at 500 (holding that the constitutional protection against coerced statements "prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and . . . it extends to all, whether they are policemen or other members of our body politic").

Lingler v. Fechko, 312 F.3d at 239 (6th Cir. 2002). Emphasis added.

In *Lingler*, there was no Fifth Amendment violation because the compelled statements were not used against the plaintiffs in a criminal proceeding. But the Sixth Circuit, quoting the U.S. Supreme Court and other appellate courts, made it clear that had criminal charges been brought, any use of those compelled statements in the criminal setting would have been a violation of the officers' Fifth Amendment rights.

That is exactly what happened here. McKinley believed he was compelled to answer questions, under the written threat that if he did not, he would lose his job. His employer, the police department, in essence, forced him to waive his Fifth Amendment right to remain silent and to have an attorney present during questioning by offering him immunity from criminal sanction.

He was promised that under no circumstances would his statements be used against him. He was further promised that the Division of Police would not release the information from his interviews to any other agency without his approval and would hold it as confidential, except as mandated by an appropriate and competent authority or as necessary for disciplinary proceedings and appeals of such proceedings, which further reinforced McKinley's reasonable impression that the information from the second interview was strictly for purposes of the internal investigation.

McKinley unknowingly waived his Fifth Amendment right against self-incrimination based solely on the threat that if he didn't answer the questions, he would be terminated and the concurrent promise that he would not face criminal charges.

He was subsequently prosecuted criminally, with the Petitioners using the very *Garrity* interviews in which they had promised him criminal immunity, as evidence against him.

Garrity does not immunize someone from prosecution for lying. But *Garrity* does protect an officer from having the state *use* the contents of the actual interview as evidence against him. As the Sixth Circuit correctly stated in its opinion:

> . . . a decision by internal affairs investigators to compel the officer to make statements and admissions to the effect that he lied – which statements and admissions are then used to convict him of lying in a prior interview – amounts to a direct violation of *Garrity*. This is not a novel or ingenious interpretation of *Garrity* but rather the only way to read the opinion if we are to give meaningful effect to the Fifth Amendment. (App. at 30a.)

After discussing the U.S. Supreme Court's precedents in this area, the Sixth Circuit stated:

> . . . we conclude that McKinley alleges a classic violation of the Fifth Amendment: a decision by internal affairs officers to compel an officer suspected of specific crimes to incriminate himself as to *those* crimes, followed by the subsequent use of the incriminating statements in a trial for *those* crimes. It makes no difference that the crimes at issue in this case are falsification and obstruction, rather than assault or robbery. It similarly makes no difference, as the Supreme Court's cases make clear, that the manner of compulsion was the threat of disciplinary action and termination of employment, rather than

> physical coercion. Indeed, if McKinley reasonably believed that Defendants would impose substantial penalties on him – such as job loss or disciplinary sanctions – if he refused to answer the questions put to him in the second interview, he was compelled to incriminate himself in violation of the Fifth Amendment. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805-806 (1977). On the facts before us, we cannot conclude as a matter of law that McKinley's belief that he would face severe sanctions for declining to incriminate himself was unreasonable.
>
> (App. at 32a-33a, emphasis in original.)

The Petitioners were certainly free to construct a perjury or falsification case against McKinley if they believed he lied in the first interview. They were just not free to use his own compelled speech against him in that prosecution.

As for Petitioners' argument that only Special Prosecutor Knowling is responsible for the use of McKinley's immunized second-interview statement at trial, the named defendants (or at least those in addition to Lt. Fortney who knew about the altered evidence) certainly bear some responsibility for passing the false evidence up the chain, so that Prosecutor Knowling relied upon it in making his decision to prosecute. They also bear some responsibility for placing McKinley in a position in which he was told prior to the second interview that he was suspected of a criminal offense, and yet was forced to incriminate himself during the second interview absent any of the protections against self-incrimination that the Fifth Amendment is supposed to afford. A common criminal is afforded more

constitutional protections than McKinley was afforded by his own colleagues.

In other words, Lt. Fortney and anyone else up the chain of command who knew that the second interview was to take place and that McKinley was suspected of lying in the first interview, had an obligation to offer McKinley the protections of the Fifth Amendment. Instead, McKinley's second statement was coerced under *Garrity*, while McKinley was under the false impression that his second statement would not be used against him criminally. Had he known what use the Petitioners were to make of the statement, he could have availed himself of the Fifth Amendment and refused to answer. Yet that would have cost him his job under the *Garrity* warning he was given.

As the Sixth Circuit stated:

> Officer Fortney, it is alleged, compelled McKinley to incriminate himself. Fortney took these actions pursuant to an ongoing official investigation. A special prosecutor was appointed. Fortney turned the statements over to the prosecutor and when the prosecutor introduced the statements at McKinley's trial, he did so through Fortney, who was on the witness stand. Viewing the facts in the light most favorable to McKinley, we hold that the alleged deprivation of his constitutional rights – i.e., the use at trial of incriminating statements he was compelled to make – was a "natural consequence of [Fortney's] actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961).
>
> (App. at 38a-39a.)

The Sixth Circuit further stated:

> To comport with *Garrity*, a state employer who compels an employee to make incriminating statements must not only promise not to use those statements in a criminal proceeding against the employee, but must also *keep* that promise. McKinley's claim is that Fortney and his colleagues *broke* that promise by compelling him to incriminate himself under the false promise of *Garrity* immunity and by turning the incriminating statements over to the prosecutor, who then prosecuted McKinley for the very crimes about which McKinley was compelled to make incriminating statements. As we have discussed, McKinley has offered enough evidence of this claim to proceed to trial.

(App. at 39a.)

Thus, contrary to the assertions of Petitioners, the Sixth Circuit correctly analyzed this case in connection with this Court's prior precedents and the Sixth Circuit decision requires no further review by this Court.

2. THIS IS NOT A CASE OF NATIONAL IMPORTANCE.

As to the Petitioners' argument that if the Sixth Circuit decision stands it will somehow lead to the elimination of *Garrity* interviews by municipal officials who fear the institution of civil actions, this is nonsense. As long as municipal officials keep their *Garrity* promises not to prosecute an employee criminally, they are safe from liability. As long as municipal employers afford their employees the Fifth Amendment protections envisioned by both *Miranda* and *Garrity*, they should be immune from

liability. If the Petitioners, once they realized they suspected McKinley of lying in the first interview and once they initiated a criminal investigation against McKinley for lying, had given him the right to remain silent via *Miranda*, rather than forcing him to incriminate himself via *Garrity*, there would have been no lawsuit. However, once they tricked him into incriminating himself by placing him under a *Garrity* warning, and then conducted the second interview as if it was only going to be used for internal purposes and then used it for criminal purposes, they opened themselves up for liability. It was the Petitioners' own actions, not anything done by Special Prosecutor Knowling or by the Sixth Circuit, that places the Petitioners in jeopardy. This is not a case of national importance, but rather one that should be the subject of intense self-reflection by Petitioners, and the U.S. Supreme Court need not review the matter any further.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

KENNETH D. MYERS
[Ohio – 0053655]
Counsel of Record

75 Public Square, Suite 1300
Cleveland, OH 44113
(216) 241-3900

Counsel for Respondent

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